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# *Public Hearing*

before

## SENATE ENVIRONMENT COMMITTEE ASSEMBLY ENVIRONMENT AND SOLID WASTE COMMITTEE

*"Testimony concerning proposed reforms to the  
Department of Environmental Protection's Site Remediation Program"*

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**LOCATION:** Committee Room 4  
State House Annex  
Trenton, New Jersey

**DATE:** April 15, 2008  
10:00 a.m.

### **MEMBERS OF COMMITTEES PRESENT:**

Senator Bob Smith, Co-Chair  
Assemblyman John F. McKeon, Co-Chair  
Senator Jeff Van Drew, Co-Vice Chair  
Senator Robert M. Gordon  
Senator Christopher "Kip" Bateman  
Assemblyman Peter J. Barnes III  
Assemblyman Matthew W. Milam  
Assemblywoman Valerie Vainieri Huttie  
Assemblyman John E. Rooney  
Assemblyman Daniel M. Van Pelt



### **ALSO PRESENT:**

Judith L. Horowitz  
Algis P. Matioska  
Carrie Anne Calvo-Hahn  
Philip R. Gennace  
*Office of Legislative Services  
Committee Aides*

Kevil Duhon  
*Senate Majority*  
Kate McDonnell  
*Assembly Majority  
Committee Aides*

John Hutchison  
*Senate Republican*  
Thea M. Sheridan  
*Assembly Republican  
Committee Aides*

***Hearing Recorded and Transcribed by  
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Hearing Unit, State House Annex, PO 068, Trenton, New Jersey***

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**SENATOR BOB SMITH (Co-Chair):** Good morning, everyone.

The significance, of course, of today is that if you haven't cast your vote in the school board election, please make sure you do it before 9:00 tonight. If you haven't paid your taxes, you might want to run out of here right now and get those taxes in the mail. And, of course, this is Earth Week.

And it's a pleasure to be co-hosting, with Assemblyman John McKeon, the joint meeting of the Assembly Environment Committee and the Senate Environment Committee. That is something that occurs rarely, when Committees in both Houses meet jointly. But it, I think, emphasizes the importance of the issue that we're going to discuss today.

I have a couple of words about that. But before I do that, I'd like to at least introduce the members from the Senate Environment Committee who are with us today.

We have Senator Bob Gordon. Bob, if you'd raise your hand. We have Senator Jeff Van Drew and Senator "Kip" Bateman. And we may have others, but at the moment, that's our starting point on the Senate side.

Just to put things in perspective a little bit, the environment, I believe, in the last number of years has had a pretty good run. We've been doing some very significant things, whether it's the Highlands legislation, the diesel particulates legislation. We just recently modernized all the environmental enforcement laws of the State of New Jersey in the last session, just established an enhanced recycling program, an electronic waste management program. We've done a lot of good things.

And that being said, what we're going to examine today is as important, and perhaps even more important, than some of the issues that we've already addressed.

Just to put this in historic context, you may remember that about a year ago our Commissioner of the Department of Environmental Protection, Lisa Jackson, came to us and said, "We believe we have a problem with the way in which site remediation is done in this state." She indicated some of the initial ideas that the DEP had. But she then set up a year-long stakeholder program, where there were frequent meetings of the people involved in this particular problem in this industry.

And that process is now over. And I believe today one of the things that we'll start off with is the DEP coming back to us with specific recommendations about how the program should be fixed. Some of the things that we're going to hear today is that we have at least a 20,000-plus backlog of cases and that the DEP believes that it needs our help to reform the process. So we're going to be very interested to see what reforms they're going to suggest.

I think we all in this room know that New Jersey, like the rest of the country, is in economic malaise. And one of the things that I hear both from the DEP and the regulated community is that one of the ways to get New Jersey back into the game economically is to help get these sites cleaned up in an expeditious fashion. We all are committed to the concept of smart growth. Everybody agrees that these are sites, especially the brownfield sites, where they've had a prior use and an opportunity to bring them back into the mainstream of our economic life, and produce good jobs, and industries, etc. At the same time, we have a paramount

responsibility to protect the citizens of the state. We have to make certain that the cleanups are done properly and that our citizens are protected.

Chairman McKeon, and myself, and both parties have been informally discussing this issue. And we've agreed that this is -- we want this to be the focus of our attention over the next number of months. We're hoping by the end of this year to have site remediation reform accomplished. And I can't emphasize enough that both parties are fully engaged in this. The environment should always be bipartisan. We don't have Democrats and Republicans when it comes to the environment. We're all trying to do the right thing by the people of this state.

So I want to-- Before we would start, I want to thank all the people who are participating today, people who have participated over the last year. And we want all that constructive criticism and all the positive suggestions that you can make.

With that, let me turn it over to my Co-Chair, Assemblyman John McKeon.

John.

**ASSEMBLYMAN JOHN F. McKEON (Co-Chair):** Senator Smith, thank you very much.

Chairman, you were kind enough to chronicle some of the things that have happened over the last five years that are so positive for the environment. And I can say with certainty that none of them would have happened without your leadership. And the State owes a great debt of gratitude for your public service.

The truth is, we had this joint meeting because I missed Senator Kip, Senator Bob, and Senator Jeff very much. (laughter)

SENATOR BATEMAN: Thank you.

ASSEMBLYMAN McKEON: It's good to be together. We're getting the band together again.

But I do have some incredible colleagues that are very hardworking on this Committee and in all of their legislative work. And for those of you who don't know: Assemblyman Van Pelt; Assemblyman Rooney, who has been the longest-seated member of the New Jersey Legislature; Assemblyman Milam; Assemblyman Barnes; and I know Assemblywoman Huttie is on her way, and said that we should go ahead and start without her.

Just a couple general thoughts: I want to really talk procedure and ground rules as to what we'll do. Now that we've introduced everyone, I'll defer to staff.

We don't need to take a formal roll, do we? (negative response)

After I finish speaking, I'm going to give each of my elected colleagues an opportunity just to address the general topic before we call our first witness, which will be the Commissioner of DEP. But as it relates to the way that we're going to proceed, we have the traditional sign-up slips. They've all been ordered. And although we're going to give the Commissioner, as well as Assistant Commissioner Kropp, a little extra time in light of -- to get us going, we're going to limit the testimony to 10 minutes per witness. So please keep that in mind. If you have written testimony, we would all much appreciate it. We will make it part of the record. And furthermore, we'll ask that you try to do your best to not read through it, but to summarize that testimony to give that time within that 10 minute ambit for questions.

Senator Smith touched on the thing that's most important to me. This is how government should work. This is our first public meeting, but there have been other meetings that have been included, of course -- professional staff that have included bipartisan representation, both Houses of the Legislature, and members of the administration. When we've vetted some of the issues and potential solutions to them, together and collectively, I'm certain that there's enough integrity, practical sense as it relates to having to do what is right by the economic interest of the state. But always of paramount concern being our environment, as the line in the sand -- that we, together, can come up with a solution to this very significant problem in our state.

Senator? (no response)

With that, I guess we'll start with the Senate. I don't know-- No one has to speak, but Senator Bateman, just because you're first in line-- I don't know if you'd like to say a few words.

SENATOR BATEMAN: Thank you, Mr. Chairman. It is nice to get back together with my former Assembly colleagues.

This is, obviously, a very important issue. And I look forward to the testimony this morning from the professionals, and some suggestions. And I offer my services to co-sponsor any legislation in this regard, because there's nothing more important than the environment in New Jersey.

And I have enjoyed my short tenure here on this Committee. I think there are many more things we could do. And I look forward to working with everyone.

Thank you, Mr. Chairman.

SENATOR GORDON: Thank you, Mr. Chairman.

It's great to be back with you again and see my colleagues from the -- former colleagues from the Assembly.

I do believe that New Jersey is at an economic crossroads now. We can either stagnate and see economic activity wither away; or we can grow, have a vibrant economy, we can accommodate the million new people expected over the next 10 years.

The major impediments to the bright future, I think, first: our fiscal house, which we're attempting to get in order. And the other is our need to reinvest in our older cities and suburbs. And clearly the site remediation process is critical to that. And I think as they are -- as the leadership of the DEP will admit, the system is now broken. These sites are not getting cleaned up, properties are being underutilized, and most importantly we're not dealing with these toxic materials that may pose a risk to our citizens.

What's happening is that the paper is flowing back and forth between consultants and the agency, and nothing is really getting done. And that has to come to an end. I'm hopeful that through this process, these reform efforts we're going to put in place, we can make a major contribution to creating a brighter future for New Jersey.

And I applaud our two Chairs for putting this process in place so that we can achieve those goals. So I'm looking forward to working with you.

Thank you very much.

SENATOR VAN DREW: Thank you, Chairman. It is good to see you again, and of course it's always good to be with my Chair here on the Senate side.

There are two reasons that I asked to be on this Committee. One of them being because I deeply do care about the environment; and obviously, everything we do, the way that we live, the quality of our lives is affected by that. And it's so very important, most especially in a state that's been challenged so much environmentally over the years.

The second reason is because, in order to effectuate that goal, to reach that finish line -- and I've had the pleasure of working with our Commissioner often on many issues that affect my district in the southern part, the southern region of New Jersey -- we need to do so in an effective way, in a relatively rapid way, in a way that the business community can understand, and that the environmental community can think is appropriate and adequate. And quite frankly, I think we need to do better in order to get the job done.

Senator Gordon was so right in what he said. There are two main areas that we need to be focused on. One, we have to improve and keep our environment, and make it better. And the second area that we have to focus on is making sure that this economic engine in this State of New Jersey -- I would say, continues to thrive but -- quite frankly, thrives, and is energized, and is incentivized more. We need to create more jobs, we need to create more economic energy, and we need to do that in a clean, and healthful, and environmentally responsible way. I do not believe those two goals are mutually exclusive, and I believe the unique challenge for this Committee, and both of these Committees, is to reach those goals. And if we don't, it is going to be the economy and the working people of the State of New Jersey who are affected.

Thank you, Chairman.

ASSEMBLYMAN McKEON: Thank you, Senator.

Assemblyman Van Pelt.

ASSEMBLYMAN VAN PELT: Thank you, Chairman.

I just wanted to say thank you for the opportunity to listen today. I'm looking forward to hearing some of the testimony.

And being a new member, I've learned quickly that I would like to just yield the balance of my time to Assemblyman Rooney. (laughter)

ASSEMBLYMAN McKEON: We're going to remind everybody on the procedure on the 10-minute time rule.

Assemblyman Rooney.

ASSEMBLYMAN ROONEY: I thank my colleague for yielding the time.

One correction: I'm the longest-serving member in the Assembly. I don't think I'm the longest-serving member in the -- including the Senate.

But I am pleased to be on this Committee. I've been on the Environment Committee since practically the first time I came into the Legislature almost 25 years ago. I served under Maureen Ogden, when she was Chair of the Environment Committee, and I was Vice Chair. And since that time, I've had a role in the Hazardous and Solid Waste Committee, Environment Committee.

And it's interesting, unfortunately, that I have probably the greatest amount of firsthand experience with these cleanup sites. And I say *unfortunately* for the simple reason that it's in my own hometown. My town consists of 4,700 people, 1.2 square miles, and probably is the most contaminated 1.2 square miles, barring a few sites, in the state.

We found, in I think it was 1984, that there was a potentially contaminated site in our town, and eventually we found out what it was. There were over 500 barrels of solvents that were buried on that site -- two-acre site, front half facing the main street in town, the back half was surrounded by woods. And this guy just piled up some barrels on the side, dug some trenches, and put in over 500 barrels of chemicals. And it was deliberate.

You would have said, "Okay. Well, if you found certain chemicals there that he dealt with, that's one thing." But when he added, for a little spice -- to the solvents, he added some PCBs and some other chemicals, you know that he was doing something really illegal. So that one site-- We have a Deluxe Cleaners site.

And then the other thing that's in the Commissioner's paper is about dry cleaning solvents. It just happened, again, in Northvale -- little, bitty town -- one of the largest manufacturers of dry cleaning machinery was in my town. So I got a pretty good education on dry cleaning solvents, and dry cleaning machines, and how they can be harmful, and how you can prevent all that.

I've really been glad to be on this Committee. Because we have the site -- we started cleaning it up probably in 1999, with the 500 barrels. We got the drums out of the ground. And then we're trying to find out where the plume is going.

The solvents that are there -- basically, if they're in air, they dissolve. The problem is, when they're in the ground, they go into the groundwater, and they contaminate wells, etc. Fortunately, in our area of the state, we don't have wells for drinking water. However, a thousand feet

from this site is Rockland County, New York, and they have over 800 wells in Rockland County. And that plume has been going toward that site since 1968 -- the nearest we could figure. So it's really important that we work within the state, and also with our neighboring state, to help this.

I am really glad that Commissioner Jackson and Assistant Commissioner Kropp have finally gotten to the point and the problems of site remediation. Because I can tell you all of the evils that we have gotten through. One of the most critical, as far as I'm concerned -- and I've stressed this at our regular meetings -- is the fact that you can't hire politically connected firms to do clean-up work. You have to hire professional firms. They have to be qualified.

For the past eight years, we had a firm that was ranked fifth in the world in environmental cleanup. They're the same firm that are cleaning up the Hudson River for GE. They're the same firm that are cleaning up the Ford site in Mahwah. And when I left as Mayor of Northvale a year ago -- a year ago January -- my replacement hired an unqualified firm rated zero in anything. And for the last year, they've screwed up so badly that the DEP, on a small side -- the Deluxe Cleaners side -- the DEP issued a notice of deficiencies, 13 deficiencies. When they were supposed to do vapor intrusion studies for 13 homes, they missed five homes. One of the homes belonged to the town. And the comment was, "We couldn't get access."

This is nonsense. It has to be corrected.

This program -- the site remediation program has to be changed to get professionally qualified people to get in there and do this cleanup.

We can't play politics as usual. We can't use pay to play. That has to be left outside the door when you're talking about the environment.

I'm tired of this in my town, I'm tired of my neighbors and my community being subject to this kind of nonsense. We want to basically clean up the environment, we want to protect our citizens, and we want to do something about changing the reputation of New Jersey of being one of the most polluted states. The Garden State is no longer the Garden State, as far as we're concerned -- what we're seeing.

So again, I'm very positive about the changes. I thank the Commissioner, the Assistant Commissioner, the Committee Chairs. And I really want to work hard to make the changes necessary to protect our citizens.

Thank you.

ASSEMBLYMAN McKEON: Thank you, Assemblyman.

Assemblywoman Vainieri Huttle.

ASSEMBLYWOMAN VAINIERI HUTTLE: Thank you.

I don't know if I should yield my time.

But you took enough time, Assemblyman Rooney.

Thank you.

ASSEMBLYMAN ROONEY: I didn't take 10 minutes.

(laughter)

ASSEMBLYWOMAN VAINIERI HUTTLE: First of all, thank you Chairman Smith and Chairman McKeon for holding this important meeting today.

I think we're all stakeholders, whether we sit on this Environment Committee or not. Each one of us that lives in the State of New Jersey are stakeholders to protect the environment.

Last year, we had the climate change -- the Global Warming Response Act. And now we need the DEP to enforce that and help us implement that great global act.

I sat on the Highlands Commission -- the task force -- so I understand -- even though coming from Bergen County, we are all subject to the drinking water coming from the Highlands -- to protect those areas.

I also understand that we need affordable housing. And we need -- we have many challenges when we want to build in those sensitive areas. We need to balance that.

But I think today -- I think what we're focused on, that we heard, also is the backlogs for the remediation sites. And I think we really need to find remedies, and incentives, and efficiencies for that. Because they're the challenges today that -- although I just heard another school in Paramus with a toxic site now. It's a playground area. With those toxic sites in Bergen County, and with the waiting and the backlogs of getting case managers out to look at these sites, we also need to balance that with getting the business community, also, so they don't wait. So I know there are many challenges. We need to balance the business community and the sites to provide incentives to hopefully make this more efficient.

So I look forward to working with the DEP and hoping that we'll find some solutions, and remedies, and incentives to make this state the Garden State that it was named to be. So I appreciate being here and look forward to working with each and every one of us.

Thank you.

ASSEMBLYMAN McKEON: Thank you, Assemblywoman.

Assemblyman Milam.

ASSEMBLYMAN MILAM: Thank you, Chairman McKeon.

Just for the record, I'm going to teach you the pronunciation of my name.

ASSEMBLYMAN McKEON: Oh, my. (laughter)

ASSEMBLYMAN MILAM: Before '09 I promise I'm going to do that.

It's Milam. (indicating pronunciation)

ASSEMBLYMAN McKEON: Milam. (indicating pronunciation)

ASSEMBLYMAN MILAM: It sounds nothing like it looks. It's okay. But I'm going to just keep correcting you, if that's okay.

ASSEMBLYMAN McKEON: I was going to say Matt, but I'm just getting to know you. (laughter)

ASSEMBLYMAN MILAM: Matt's fine, too. I will answer to that, as well.

Thank you, Chairmen Smith and McKeon, for seeing -- having the insight to put this together. It's very important.

I look forward to hearing the testimony, learning about what's been going on, and then working with the DEP to give the tools that they need to get this taken care of right away. It needs to be. It's a very important issue.

There are a lot of issues that are going on with the state. But this sounds like it needs to be the start of the issue to get more economic

things going. And I do look forward to serving on this Committee and being part of the process to get this thing moving.

Thank you.

ASSEMBLYMAN McKEON: Thank you, Assemblyman.

Assemblyman Barnes.

ASSEMBLYMAN BARNES: Yes, Mr. Chairman.

Do me a favor please. Do not allow Mr. Van Pelt to yield any more time to Mr. Rooney. (laughter)

ASSEMBLYMAN ROONEY: Your father wouldn't have said that. (laughter)

ASSEMBLYMAN BARNES: I'm only kidding.

It's a pleasure to be here. I agree with Mr. Rooney's sentiments very much. We can't forget our history here in New Jersey in some of the environmental problems that we've had. I realize that we need to balance the interests of the economy, but we can't forget -- and I respectfully say it -- a-not-so-proud tradition. And I think we need site remediation reform. And it's a pleasure to be here with my colleagues in the Senate and the Assembly to learn more about the issues.

ASSEMBLYMAN McKEON: Again, thanks to all the elected officials for being so diligent and giving us this extra time.

And I believe, with no further ado, we're going to invite Commissioner Lisa Jackson, along with Irene Kropp, the Assistant Commissioner as it relates to site remediation, to come--

I note in the back the very new Deputy Commissioner Jennifer Godoski -- has just been named, replacing Adam Zellner as-- I don't know if that's good, bad, or indifferent.

But congratulations to you, and we'll all look forward to working with you.

Commissioner.

**COMMISSIONER LISA P. JACKSON:** Thank you.

Thank you, Mr. Chairmen, thank you members of the Committee, for allowing me the opportunity to spend just a few minutes.

I will also yield most of my time so that you can hear the substance of the recommendations this morning, rather than my overview.

And thank you for recognizing Deputy Commissioner Jennifer Godoski. Today is her very first day, and we're excited to have her in the Department.

Today, for me, is really about promises made and promises kept. I did promise this Committee, back in October of 2006, that we would take a comprehensive look at our site clean-up program, that we would find a way to sift through all the good -- and there is good in that program -- and the bad, and maybe a little bit of ugly, to try to make recommendations that we felt represented the best thinking on the issue of what a site clean-up program should look like as we enter this new millennium.

Our Site Program at the DEP is decades old, and so we have benefit of experience, and maybe a little bit of the curse of that same experience and a belief that doing things the same way will make things change.

There are promises that have been made here, not just to this Committee but, I feel, to the Governor, as well, who has challenged each of the cabinet members to find a way to serve the citizens of the state and the

varied interests of the state in very, very tough budget times. And so I think the proposals you will hear today are all about trying to become efficient; as well as continuing to do business and making sure that, above and beyond all, we protect human health and the environment, which is our goal at the Department of Environmental Protection.

It's also promises made to mayors and towns all over our city -- towns all over our state, and cities all over our state, and to business people, and to the environmental community, and to any number of stakeholders, all of whom have been involved in the process that led to today's recommendations.

There's also one other kind of promise I'd like to bring up, and that's the promise that's in the kinds of pictures that dot the halls of the DEP. On our good days, we take a minute to look at them. And that picture (indicating) is of a *site*, as we call it, in Butler, Morris County. And the before picture clearly is a sight to see, and that's what we work on. But the after picture is a community. That's a mixed-use development, residential, commercial, streetscape. It's what we are all aiming for. And so that's the promise that I hope these recommendations will keep in front of us, as well. Because that is the goal and the vision for what a site clean-up program should be.

I heard Assemblyman -- Senator -- I'm so sorry -- Senator Gordon say that the program is broken. And I will soften that just a bit to say that some things work well. But as I said before, I really believe that there is a curse in doing the same thing over and over, and expecting a different result with, quite frankly, fewer and fewer resources that can be used to patch problems as they come along.

You did hear already this morning that when I was here a year-and-a-half ago, we had 16,000 sites. We are above 20,000 sites now. And the Assistant Commissioner Irene Kropp, who I will introduce in a second, will take you through how that happens in her program.

What's important is that this set of recommendations is stakeholder-driven. I call it *organic*, kind of homegrown. We like those terms at the DEP, but they mean something here. Because I think for transformational change in a program, for Assemblyman Rooney to feel at the end of the day that something will happen different than is happening now, the entire program and all stakeholders have to have been involved in that discussion. And I welcome and thank you for your support of that kind of discussion as well.

I think the recommendations you will hear increase accountability, increase enforceability, increase the potential for economic growth in programs that-- Our brownfield program, for example, gives away hundreds of millions of dollars in grants and loans in order to stimulate economic growth -- everything from clean-up jobs, which are, after all, green-collar jobs; to the jobs that come once a community has been transformed by a cleanup. And so I think -- and I'm excited by all those things as well.

The last thing I'll ask is that this Committee listen to the recommendations, and obviously to the criticism. And the democratic process says we have to listen to people who like and don't like what we come up with. And then you have the job of weighing all that and, I hope, assisting us in making the legislative changes that will be needed to transform this program.

In doing that, I ask that you just ask yourself one thing, because we've done this for 18 months -- actually, the Assistant Commissioner has done much more of it than me -- and that's to ask what's real versus what's rhetoric. If someone believes that there's a better way, we're all ears to hear it. But I ask you to also remember that the good old days are gone, the days when this was a young program where we were excited by the idea of cleaning up a couple thousand sites are gone. And now we have a program where we are requested daily by communities all over this state to make a difference, to move something forward, and to ensure that their health is not being compromised at the same time. And that 2,000 sites has morphed into 20,000 sites. And that's the reality that we face with resources that are not going to increase, at least not in my mind, in this budget climate.

One last caveat: Doing something fast doesn't mean you do it worse. Doing something fast and carefully, with the appropriate amount of checks and balances -- which I feel sure this Committee could help ensure -- means that work will happen, and that a cleanup actually takes place, because this is about enabling cleanups. And that, in and of itself, I think is a very good thing.

I have become fond of saying we should not let the perfect become the enemy of good. There is much good in the recommendations that you will hear. And there may even be some perfection in places. I'll leave that to you to find and to create.

So thank you.

With that, I'll turn it over to the Assistant Commissioner for Site Remediation Programs, Irene Kropp. Irene's been in the Department for--

**ASSISTANT COMMISSIONER IRENE S. KROPP:**  
Twenty-five.

**COMMISSIONER JACKSON:** --25 years. She's worked in just about every area and, most recently, was head of our management and budget group before I begged her to move over to site remediation.

**ASSISTANT COMMISSIONER KROPP:** Good morning, everybody.

I'm going to go through the major recommendations that are cited in the testimony today. There are some other recommendations, legislative reforms, that the Commissioner and I are supporting that I won't go into because they're smaller, less detailed, less meaty. But they will be posted on our Web site later today so everyone can see those. And I'll be glad to send copies of those recommendations to the Chairs of the Committees.

I also wanted to say that the recommendations that we're supporting today are not contained in the white papers that the stakeholder group put together. The issues are contained in our stakeholder white papers; the recommendations are those of the Department. They don't represent necessarily the recommendations of the stakeholder groups.

I also want to say that we have not fleshed out all the details of these recommendations. There's a lot of work that has yet to be done with the staff from OLS and the Committee members so that we can come up with a comprehensive package that's acceptable to everyone.

The first thing that I'm going to talk about, which is the keystone of our legislative reform, is licensing environmental consultants. As the Commissioner noted when we spoke in front of -- or when the Commissioner spoke in 2006 in front of the Senate Environment Committee, there were 16,000 cases in the Department. There is now over 20,000 cases. We have a chart that is basically showing new cases as they come into the Department and the number of NFAs, or no further action, letters that we issue each year. No further action letters primarily are when a case is closed, although no further action letters can be issued for just a piece of a site also.

So there is a growing gap between the number of new cases and the number of cases that have closed out. The majority of the cases that are coming into the Department now, in addition to daycare cases that are the result of the Kiddie Kollege legislation, are transactional cases. They're cases that are in need of a no further action letter or a remedial action work plan approval from the Department, not necessarily because it's legislated, but because financial institutions, environmental insurance companies, mortgage companies are requiring homeowners and businesses to get no further action letters and remedial action work plans from the Department.

We often get requests from everyone in the State of New Jersey -- from mayors, local community leaders, environmentalists, legislators -- to expedite a lot of the transactional cases, because there are financial deadlines associated with those cases. We like to do that, we try to do that. We cannot prioritize every redevelopment site in this way.

And two problems result from this growing transactional impact to the Department. The problems are: Number one, there are a lot of cases

out there that have more serious environmental concerns that we're not getting to. And, number two, there are really good economic redevelopment projects that we're not getting to, which is a problem for municipalities because those sites remain off the tax rolls.

So we're recommending a two-pronged approach to handle this problem: the growing case load and the need to move cases through the system for environmental and economic purposes. The two-pronged approach is: number one, dealing with our current business practices. We are looking at how we are handling the review of cases and documents that come into the Department. We are trying to streamline that process. We have done that in the case of homeowner heating oil tanks and soils-only cases. They come into the Department and go through more of a checklist review, because they are low-risk, smaller cases.

The other thing that we're recommending today -- again, this is going to require legislation and is a keystone of moving forward -- is licensing environmental consultants.

The state of Massachusetts has a Licensed Site Professional Program, which I'll talk about briefly. That is one of the programs that we looked at in deciding how we wanted to move forward. There are quite a few other states that also license site professionals.

Our plan is to license site professionals so that they can be held more accountable -- environmental consultants -- for the work that they provide to the Department so that we can, for the first time ever, actually take enforcement action against a consultant for the product or lack of compliance with regulations. And we would still -- the Department -- be

responsible for all the inherently governmental functions, which is not what the Massachusetts program does.

We would issue all no further action letters. We heard from the financial institutions that they would prefer that that be a final agency action and not something handled by licensed professionals. We would review all cases, especially receptor evaluations and off-site contaminant migration impacts. We would audit cases based on the potential risks. And we, more importantly, would expand our current oversight for cases that are the worst cases, cases where there are serious environmental impacts or cases where the responsible parties are recalcitrant.

So we would require legislative reforms to impose strict requirements on licensed consultants. We would develop a tiered approach to review cases, where lower-risk cases would get less of a review than the higher-risk cases. We would adopt a new enforcement program that would enable us to revoke or suspend the license of any consultant that did not adhere to a strict code of ethics. And we would issue a penalty to consultants who did not perform in accordance with our regulations.

The primary goal here is to loosen the reigns between the consultants and those who pay them, and to hold individuals truly accountable for the quality of the remediation that they perform.

One of the things that you're going to hear today -- or two or three of the things you'll hear today is that this is a privatization program. We don't think so. There is enough work for the rest of the folks in the Site Remediation Program in auditing, enforcement, site assessment, inspections, doing the reviews, etc., that there should be no impact to union employees. You'll also hear that the Massachusetts Licensed Site

Professional Program is not very effective. We disagree with that, but we still chose not to adopt it in its entirety.

Some very basic information from the Assistant Commissioner of the Massachusetts DEP-- And let me say that Commissioner Jackson and I flew to Boston about a year ago to meet with them and get information. And we've been talking to them since then. But when Massachusetts first adopted the program -- before they adopted the program, about a hundred to 200 cases went through their system annually. Right now, 2,000 to 2,500 cases go through the system annually. But most importantly, the majority of those cases go from notification to cleanup within one year, which is pretty remarkable.

Last year, Massachusetts screened -- did audit screenings on 2,600 cases, which is primarily all the cases that came into the system. They performed field audits, so they actually went out to the site to investigate sites when they thought there might be a concern for 325 of those cases. And for 160 of the 2,600 cases, they performed more comprehensive audits, which is similar to what we were talking about with an expanded oversight program.

So 5 percent of the overall caseload that came through the system needed to have a comprehensive audit and required additional either sampling or documentation. That's only 5 percent of the overall universe. And most importantly, only 10 of the final decisions that were rendered by the LSPs needed to be reopened for additional work because the environmental decisions were not correct. So that's less than 1 percent of the cases that went through the system annually.

Another key aspect to legislative reform that we are going to be requesting is remedy selection. In the past, when the Industrial Site Recovery Act was amended, the ability for the Department to select a remedy was reduced so that we could only overrule a remedy selection when we found the selection to be unprotective. We don't think that's good enough, especially in the case right now for residential uses, schools, and educational facilities. And with regards to residential -- specifically those residential uses where there are single-family homes on contaminated sites, because often there's not a homeowners association to deal with any institutional and engineering controls; and also residential developments on landfills.

In addition, we think that remedy selection should be afforded to the Department when a remedy is going to be protracted a very, very long time; or somebody's coming in with an innovative remedy for treatment that doesn't work, and they keep recommending more, and more, and more treatment so the cleanup is -- takes a lot longer than need be.

And then lastly, there are situations where remedies have been approved that rendered pieces of property in municipalities just totally unusable. They have been entombed, they're a landfill that's 30-feet high covered with concrete, etc. In instances like that, we think the Department, in consultation with the municipality, should be able to overrule a remedy.

One of the things that was discussed extensively in the stakeholder sessions was the use of permanent remedies. Right now, the statutes reflect a preference for permanent remedies. And a lot of individuals would prefer that -- especially in the situation where there is educational child care uses, residential uses, or overburdened communities

-- that all remedies be to a permanent standard. We don't believe that that is feasible for a variety of reasons, but we understand the request and the need.

What we are offering as an alternative is establishing presumptive or more enhanced protection remedies for certain types of sensitive uses such as new schools and child care facilities, providing financial incentives for permanent remedies -- which I'll talk about in a couple seconds -- strengthening the effectiveness of the institutional and engineering controls by establishing a new permit program. The DEP undertook a huge enforcement initiative this past year, which evaluated the use of the existing engineering and institutional control programs that we have in place. And we found that there was over 80 percent noncompliance. And we're getting people back into compliance, cleaning up the fact that a lot of current property owners do not understand that they bought or are living on property where there were institutional and engineering controls. So we're recommending a permitting program. And the permit would travel with the transaction of the property so that people have a better understanding of what they're purchasing.

We are also talking about integrating this with the one-call system that BPU currently runs. And we would like to establish mandatory time frames for completion of remedial investigations and remedial actions so cases cannot languish in the Department for 15, 20, 30 years.

With regard to finality, one of the major issues discussed in the stakeholder meetings raised by the business community was the fact that the Department does not provide for finality as part of the clean-up process. We believe that we might have the ability to do that using an existing fund,

the Remediation Guarantee Fund, that was set up a couple of years ago but never used. Originally, the fund was set up so that when responsible parties who were required by legislation to establish financial assurances do not clean up their property, this fund could be tapped to clean up the property. Right now, we have the ability to go after those financial assurances. The fund was never truly used, but the \$5 million is still out there in reserve.

Also right now, under current legislation, 1 percent surcharges are capped annually to those financial assurances. And that 1 percent surcharge goes to the HDSRF fund, the fund used for brownfield development. What we're recommending is the 1 percent surcharge be taken off and put into the Remediation Guarantee Fund. We're also recommending that we limit the use, or eliminate the use, of self-guarantees. That's the mechanism that a lot of the larger corporate companies like to use for guaranteeing financial assurances. A lot of smaller folks use credit surety bonds, etc. So if we limit the use of self-guarantees, expand the universe of the individuals that pay that 1 percent surcharge, about \$14 million a year would be generated by the companies again and the individuals that we require to put up financial assurances. That money would go into the self-guarantee fund for two purposes: to incentivize permanent remedies, and to protect against remedy failure and order of magnitude changes in our standards when no RP exists. So if you clean up to a permanent remedy, you can walk away from the site and know that this fund would be there if there's a change in order of magnitude or if there's a change in use of this site. And if you are a homeowners association, or somebody who now owns property where there is no RP

available, this fund would be able to be used for order of magnitude changes and remedy failure when an institutional control is used.

One of the other things that's really important, as the Commissioner talked about economic redevelopment and revitalization for New Jersey, is brownfield redevelopment. One impediment that we have found to developers taking on the responsibility to clean up sites is the fact that they are still, under current legislation, liable for any off-site contamination. So if there's a piece of property that they're interested in, but groundwater contamination has moved to neighboring properties or soil sediment contamination exists in the river adjacent to the property, when they knowingly purchase that property -- knowing that there is contamination, there is still (indiscernible) liability associated with off-site contamination as well as on-site contamination.

We're recommending that we do away with their off-site liability responsibilities. We, the Department, would aggressively pursue the original responsible discharger for that off-site contamination. When there is no responsible party available, we would use public funds to do that additional cleanup so that the developer is not responsible for any contamination that is off the original piece of property that they're trying to purchase.

One of the things that we are recommending with regards to notification to locals -- and we do believe that there is still a gap between what goes on in a municipality, what the Department knows, and what the local officials know -- is expanding the Kiddie Kollege bill so that in addition to dealing with notification to locals for child care and for schools, there is notification to municipal officials and the prohibition for issuing a

construction permit or a certificate of occupancy when a piece of property is being -- has a change of use from industrial/commercial to residential. To this day still -- in the last week or so we heard of a site that was an old ISRA site -- was going through the process. But the developer moved forward and developed the site with residential development prior to getting approvals from the Department. That means that the local officials issued construction permits. And since it was two weeks until the opening, I'm sure the certificates of occupancy were also issued. So we need to close that gap and make sure that the locals get notified any time there is a development that's going to residential that was previously either a contaminated site or was an industrial/commercial use.

Additionally, we are asking that even if a site has an NFA in the past, but the use is changing to school, child care, or residential, that the site undergo a preliminary assessment in site investigation. There is a large number of the general public, development community that don't understand what a conditional NFA is. So a site can have an NFA from the Department that's a conditional NFA. There could be contamination on the site, there could be ongoing commitments to monitor, to notify subsequent property owners. People don't understand that. They don't understand exactly what they're purchasing. So we're saying they should come back in the system any time you're developing a property that's going to residential use.

Underground storage tanks: Currently, the Department processes between 4,000 and 5,000 homeowner heating oil tank cases every year. This is a problem that doesn't seem to be going away. This is a problem that we don't want to pass on to grandchildren and children. So

what we're recommending -- even though there is a strong preference for above-ground tanks in the current UST Grant program for homeowners -- is, we're proposing a ban on all new underground storage tanks for homeowners. If there are local ordinances or technical reasons why there cannot be an above-ground storage tank -- maybe because of shallow bedrock, etc. -- then we would recommend that there be secondary containment mandatory for that. EDA currently gives out grants for non-leaky tanks. We could increase those grants by \$1,000, from \$3,000 to \$4,000, to cover the cost of secondary containment. And the Department currently gives out grants to replace leaking tanks.

There are some other recommendations I'm not going to go into -- because I don't understand them that well (laughter) -- that deal with regulated tanks and making sure that the State regulations are consistent with the Federal Policy Act.

And then lastly, I just wanted to touch on dry cleaners. As Assemblyman Rooney noted, dry cleaners are a huge problem. The perchloroethylene that is used as a solvent is highly mobile. It travels very far. We have a lot of cases in the Department -- but less than we would expect, which means there are a lot of time bombs out there -- where cases have impacted private wells, and there's serious vapor intrusion problems, where the vapors from the dry cleaners, as part of the remediation -- I'm not talking about the air permitting stuff right now -- as part of discharges to groundwater, are impacting residents, commercial developments, etc.

One of the real serious problems is, a lot of dry cleaners -- especially in our urban areas -- are colocated with commercial facilities. They could be restaurants, pizza places, children's Gymborees, etc., as well

as residential developments. There's a lot of places where there are apartments right above dry cleaners. We think that there needs to be a dry cleaner program established -- a lot of other states have already done this -- where there is a fund specifically set up for dry cleaner remediation. The dry cleaners who are the owners of the property, but very rarely the original discharger, can use this money for grants and loans to do actual remediations. They're small businesses for the most part. There's not a lot of money out there. These remediations are complex, especially if there's bedrock involved. So this would be a way to help them do remediations that are protective -- not just the waters of the state, but the individuals that live in and around the dry cleaner facilities.

So in closing, there are a couple other legislative reforms that we are supporting that are smaller. They're cleaning up the statutes, they're strengthening our enforcement program, they're expanding the use of the HDSRF fund -- in particular to day care facilities, because we currently give them about \$1,500 grants. We want to up that money to help them get through the remediation process. As I stated, those reforms will be on the Web site later today.

And with that, any questions?

ASSEMBLYMAN McKEON: Thank you, Senator.

I just have one or two, just first, and then we'll open it up to our colleagues, starting with Senator Smith.

As it relates to the absolute worst case, or the category that we're looking to separate -- without specific details of that, just basically what you might have in your mind -- how many of those 20,000 cases

would fall in the category of those that could be dealt with through the new process?

ASSISTANT COMMISSIONER KROPP: Two things: first is, we would require anyone who works on the remediation of a site in New Jersey to be licensed. So everybody who is doing work would have to be licensed. The cases that we think would fall out -- there's about 4,000 to 5,000 cases right now that are homeowner heating oil tanks, that are currently handled by certified contractors. So they are kind of off the plate but being worked on right now. About a thousand or so cases, we think, should be in the expanded enforcement program. So we would have direct oversight and expanded oversight. So that would leave about 14,000 right in the middle, from the lower-level to some complex cases, where we would vary our degree of review on those cases. Lower-level cases, we would do checklists or checklists-plus. The higher-level cases, we would do more of a review, but not the degree of review that we're doing today. So about 14,000 cases, we're hoping, would get into the system relatively quickly.

ASSEMBLYMAN McKEON: Okay. Thank you very much.

Another thing that I think bears repeating, for some of us who weren't at the initial meeting that we had, are the challenges of DEP -- particularly your unit -- as it relates to OPRA requests. I think we all understand how important it is to have transparency and have materials available to the public. But has your experience been -- I don't want to put words in your mouth -- that it's being somewhat misused as it relates to not public interest groups or citizens, but through attorneys who are using DEP through their due diligence?

ASSISTANT COMMISSIONER KROPP: Right. The Department of Environmental Protection receives approximately 60 to 65 percent of all the OPRA requests that are received annually for the State. The Site Remediation Program receives 85 percent of those OPRA requests. So there are thousands of OPRA requests that come into the Department every year. For the Site Remediation Program, what that means is, very, very often, as a case manager is working on a case, virtually every file that they have, that they're supposed to be working on, has to be sequestered, pulled aside, redacted, held so that somebody can come in and go through those files. So they lose their working materials, on any given day, for weeks at a time.

The problem is that it impacts not just the OPRA Office staff, which currently is housed in Site Remediation; we have to employ a lot of temps to actually run around, go retrieve boxes from warehouses, pull documents, etc. But the case managers actually have to take time from doing site remediation work to do OPRA reviews of cases and cases of documents. We don't have *a* document per case -- per project, we have boxes and boxes that may go back five, 10, 15 years. So the majority of the people who make these requests are attorney offices and consultants, people who are either looking for business or are doing their due diligence through the OPRA process. So the resources that the Department puts into this is to help a lot of private entities.

ASSEMBLYMAN McKEON: Would it be fair to say that it's about 25 percent of staff time that is spent on dealing with OPRA requests?

ASSISTANT COMMISSIONER KROPP: Well, they might say more. (laughter) Yes, I would say there's at least 15 to 20 percent of

the time spent dealing with OPRA requests, depending upon who you are as a case manager. If you have the really big cases, or the really controversial cases, yes. And a lot of the people who deal with some of the smaller cases -- less so.

ASSEMBLYMAN McKEON: I appreciate that. I think that's just outrageous.

Senator Smith.

SENATOR SMITH: Do you have a solution for that?

ASSISTANT COMMISSIONER KROPP: Legislative reform.  
(laughter)

SENATOR SMITH: Which would specifically provide for?

ASSISTANT COMMISSIONER KROPP: I don't think that-- I think the intent of OPRA was to help the general public to access information in government documents. I think that's valid. I think that still needs to be there. I don't think that law firms and consultants who submit multiple requests on a weekly or daily basis should be allowed to abuse the system. I'm not sure how to fix it legislatively, but I think that we could carve that out.

SENATOR SMITH: Okay. It's something we obviously need to work on.

Two questions: one -- and a very controversial, I'm sure, portion of your testimony, is the one in which there's the request that the Department would have the ability to select remedies. Right now we have a situation in which they can meet the 10 in a million -- one in a million standard, in terms of health protection. That's considered to be the line beyond which nobody can cross.

I noticed in your testimony you said that the cases where the Department should have that ability is based on the ultimate use of the property. I was a little surprised at that. I thought it might have been based on the toxicity of the materials. Why did you choose the use of the property as the rationale for the Department opening up the remedy?

ASSISTANT COMMISSIONER KROPP: I think that the Department needs to focus on the exposure pathways for the most sensitive individuals. When you are cleaning up a site, and you're leaving some contamination behind -- regardless of the toxicity -- it's an industrial facility, and there's two feet of concrete -- that's very different than when you allow a facility to be used for child care, schools, or residential, and you do not have the controls that you would more than in an industrial setting.

People who have a two-foot cap in their backyard in a residential situation could go out and plant trees, landscape, build decking, and be going below that two feet of clean fill. So although two feet of clean fill may be protective today, it is not protective, necessarily, over time. So what we will be recommending is, in certain scenarios, a more protective or enhanced remediation. So, for instance, single-family homes -- probably that upper four feet or so of soil in somebody's backyard needs to be clean so that there is no way that they can get to any levels of contamination.

SENATOR SMITH: The second question: on the licensed site professionals. In our formal discussions, we have expressed this concern. And I'm not quite sure how Massachusetts does it. But if the local level -- local governments, frequently, in the land-use process have a process where an applicant for an approval will pay into an escrow fund. That escrow fund will then be used to pay the professional that's been hired by the

municipality, the county, whatever, to review the applicant's application and make sure that the governmental and public interests are protected. Do you envision, if the licensed site professional program went forward, that you would use that same escrow system, or do you envision something else?

ASSISTANT COMMISSIONER KROPP: I envision something else. They do not do that in Massachusetts. Right now, we require financial assurances from the responsible parties -- most responsible parties to ensure that a cleanup gets performed. We're talking about expanding that, maybe using an escrow account for the cases that we would expand our oversight on. But I don't think that oversight of escrow accounts is something that would benefit the remedial process at this time, and would probably take more resources from the State to review, and monitor, and oversee the expenditures in those accounts.

SENATOR SMITH: I understand. But let me put the ethical case before you. I don't think it's a good thing for the applicant for a permit, or even for a clearance of an underground storage tank, to ultimately have the power of the check. Because, ultimately, they say to the engineer or to whoever is doing this work -- that we all agree is competent, and has integrity, and whatever-- But they ultimately have the power of the check. If we don't-- If we're not actually paying them -- we, the State of New Jersey, are not actually the employer, I'm a little worried that the ethical firewall has broken down, that the professional may be subject to some influence or pressure from the applicant in order to get paid.

So I'd appreciate it if you'd rethink that a little bit. All right?

That's my last question, Mr. Chairman.

ASSEMBLYMAN McKEON: Mr. Chairman.

Any of our colleagues, in no particular order.

Senator Gordon.

SENATOR GORDON: Thank you, Mr. Chairman.

I'd like to just commend Commissioner Jackson and Assistant Commissioner Kropp for a very comprehensive presentation. Obviously a lot of work went into this -- into these proposals.

I noticed, however, that there really wasn't any discussion about the standards that are in place for contaminants. Some critics of the existing system have argued that there are currently standards in place that are just unattainable for them. They site, for example, that -- I believe for aquifers -- even for aquifers in areas that are not going to be developed, the standard in place is to create drinkable water. Literally, one would be able to put a straw into the aquifer and drink from it. The critics suggest that if the standards were modified, you would see a lot more development without a commensurate increase in risk to public health. Did you think about changing any of the standards?

ASSISTANT COMMISSIONER KROPP: We did not think about changing any of the standards. Right now, under the Water Pollution Control Act and our Brownfield and Contaminated Sites Act, we are required to establish standards to the 10-to-the-minus-six health risk that are protective of human health, but also protective of the aquifers for the State of New Jersey. We assume that the majority of the aquifers in the State of New Jersey can and may be used for a drinking water supply in the future, even though they are not used for a drinking water supply right now.

One of the discussions we did have dealt with corrective-based remedial actions. In Massachusetts, for instance, the decision to clean up groundwater is based on one of three things: Is there somebody actually drinking the water? And in that case, they clean it up to drinking water standards. Is there an impact to a building for vapor intrusion reasons? And if so, they clean it up to vapor intrusion numbers. Is there an impact to an ecological community? And if so, they're cleaned up to ecological-based standards.

But right now, for the State of New Jersey, we look at ecological, we look at vapor intrusion, we look at drinking water numbers, and we go with the more stringent of those three.

SENATOR SMITH: Assemblyman Rooney.

ASSEMBLYMAN ROONEY: Thank you very much.

Thank you, Irene.

And thank you, Commissioner Jackson.

Basically, we've had a long relationship on these. I had many questions at the former meeting. And I believe Chairman Smith covered one of them about the conflict of interest situation on the licensed site professionals. It does matter. I brought that up at the last meeting. It does matter who is paying you, who is paying that check. And if you have an RP, a responsible party, having to pay the engineer, there's a problem there. He could hold that check up. There could be some shenanigans back and forth. So as Senator Smith said, it's much preferable to have the Department or someone else to pay that engineer. Because he really isn't working for the responsible party, he's working for us. He's the regulator. And that's the important thing.

A couple of the other issues is that in the previous meeting you mentioned the Cleanup Star Program. That's pretty much an abject failure. The Cleanup Star Program isn't working. There are many, many professionals that have gone out, gotten qualified for it, and then sat there with no work. And I hope that when we're talking about the licensed site professional program, it's not going to be another Cleanup Star Program.

It has to be better than it was. It has to be something that we're going to use. We need to have those professionals, we need to have them qualified. And that was the other thing -- about the qualifications. That's one of my big issues -- to make sure they're qualified.

One of the things that you mentioned is the local, back and forth information. One of the worst things that I've ever seen was the Hoboken situation. You know I was deeply involved in that one. The people-- There was the Grand Street artists that moved into a building. It was an old loft building. They actually condoed it off into apartments. They were in the building about a year, and all of a sudden people started getting sick. And it should have been a no-brainer as to why people were getting sick. The building was a mercury vapor lamp division of General Electric. It last was in operation in 1946. It closed down and became a machine shop. And then the owner of the machine shop, who had worked for GE at the time, then decided to condo it off.

There were twin buildings in that same area -- within a few blocks of each other. The one building came up, and the DEP, to its credit, turned it down for habitation by people -- for residences. This building comes up three years later and nothing happened. It wound up being condoed. People got sick. They were pulled out of the building. The

mercury was in the building. And because the building was energy efficient -- closed up -- the heat in the building actually vaporized the mercury, and people were breathing it in. The reason I got involved was a good, personal friend of mine lived in the building with his wife and small child.

So that's the kinds of things that could have been prevented very easily. The city of Hoboken, the county of Hudson, and the DEP all knew what the building was previously, and yet nobody put up a red flag. That has to stop.

And then I see-- I thought that-- When I was Chairman of the Solid and Hazardous Waste Committee I thought that we stopped that, that we prevented that from happening again, and then Kiddie Kollege comes up. It's the same damn thing. If we can't learn by our unfortunate experiences, then we're really stupid.

So these are the kinds of things we've got to prevent.

So that's one of the other things.

You mentioned OPRA. I have a problem with, as you know-- And I probably won't go there -- just a little bit-- When a legislator-- Actually, what happened was, the previous engineer left, the new engineer comes in, makes a phone call to the DEP and says, "Oh, we're the new engineer in town," which wasn't true. They weren't the new engineer in town, and they wanted the complete case file.

First thing was, they got it on a phone call. The second thing was that there was information in that that clearly said on it, "This is confidential material from the previous engineer." That was given to this person, so he didn't have to do any work. He took that same information, resubmitted his application, and got approval from DEP for \$300,000

worth of work, which consequently they screwed up. And you have a letter of 13 deficiencies by that engineering firm. These are the kinds of things that have to stop.

And what I want to see is that -- any of that information go to the town -- I would like to see it in my legislative office. I want to see copies of information that you send to my communities on these particular issues. I want to see what's happening in that town. I want to know about it.

Now, maybe I'm a little smarter than the average bear on site remediation and hazardous materials. But I'm going to look at it, and I'm going to try and assist these communities in what they're doing. I want these things cleaned up.

So these are the kinds of things that I'm looking for in the new program. And I will work with you in any way that I possibly can. But please work with us. Let us know what's going on. The communities should be getting lists. And I don't know why anybody would come in--

You know, the Danzig site was listed as potentially contaminated from 1984 until currently. There's certain sites that are potentially contaminated. Why anybody would go in there and do something like a Kiddie Kollege or housing development I have no clue. But it's got to stop. We've got to close that loop. And we've got to work together.

I know some of the environmentalists aren't happy with some of the legislation being proposed. But this-- It's basically some preventive things that we have to do. And I want to, again, commend both of you for the excellent job you've done.

And to come here and say this is broken takes a lot of guts. It's been broken for a long time. And I'm glad you appreciate it, and I'm glad that we're trying to work together.

Thank you.

ASSEMBLYMAN McKEON: Thank you, Assemblyman.

Jeff, did you have a question?

SENATOR VAN DREW: Yes.

ASSEMBLYMAN McKEON: Senator Van Drew, and then Senator Gordon.

SENATOR VAN DREW: We're all so formal today.

Thank you, Chairman Assemblyman McKeon.

Let me thank you, first of all, for your good work with this.

One question in general, and then one in specific. In general, from the Massachusetts experience, and from what you know, and from what you've done here, and from what you recommend -- the entire site remediation process, in most cases, would function much more efficiently, I would hope; much more quickly; and that there would be much less of a backlog?

ASSISTANT COMMISSIONER KROPP: Absolutely. That's the goal.

SENATOR VAN DREW: Right. And from the Massachusetts experience, that very much has been accomplished there?

ASSISTANT COMMISSIONER KROPP: Absolutely.

SENATOR VAN DREW: Where did you digress? Where are we different in what you recommend from what they've done in Massachusetts?

ASSISTANT COMMISSIONER KROPP: In the Massachusetts program, the state agency does not issue the final decision. In our case, we call it a *no further action* letter. They call it a *rendered opinion*. So the actual licensed site professional makes the final call. That's one huge one.

The other thing that we're recommending -- at least up front -- is that Massachusetts has a separate licensing board that develops the tests, gives the tests, and takes the enforcement action. We are saying that in order to establish a board, we're two to three, at least, years away from being able to implement anything. For the economy of New Jersey, it's better, right now, to start with a program where we grandfather in environmental consultants that have been working in this state for the last 10, 15 years and let them be the licensed site professionals. We'll give a test down the road. But we should really start as quickly as we can.

Those are two of the major differences.

SENATOR VAN DREW: Good. And the previous difference was because you still want to have that final check and balance, in other words, just to make sure?

ASSISTANT COMMISSIONER KROPP: We heard from the financial institutions and a lot of the brownfield developers that it was important for the sign-off to be from the State agencies as opposed to third-party.

SENATOR VAN DREW: Because?

ASSISTANT COMMISSIONER KROPP: Whatever sets -- financial institutions I guess. (laughter)

SENATOR VAN DREW: They had more security that the sign-off was appropriate?

ASSISTANT COMMISSIONER KROPP: Right, that there's a governmental--

SENATOR VAN DREW: Okay. Then the specific question I had is: underground storage tanks. You touched on that very briefly. If you could just touch on that. And does that apply to both oil, propane, all forms of underground storage tanks? I didn't quite catch that.

ASSISTANT COMMISSIONER KROPP: For the banning and secondary containment?

SENATOR VAN DREW: Yes.

ASSISTANT COMMISSIONER KROPP: We're talking about homeowners' heating oil tanks.

SENATOR VAN DREW: Okay.

ASSISTANT COMMISSIONER KROPP: And then every type of underground storage tank that is regulated, which includes more than just heating oil. We're talking about secondary containment to make it consistent with the Federal policy act.

SENATOR VAN DREW: Would homeowners include propane as well -- a ban on that?

ASSISTANT COMMISSIONER KROPP: No, we were not doing that. We were not thinking of that.

SENATOR VAN DREW: Thank you very much.

SENATOR SMITH: Senator Gordon.

SENATOR GORDON: Thank you, Mr. Chairman.

A couple of questions. First, on the licensed site professional: I'm concerned about the accountability aspects of this. Are we going to have a board of licensed site professionals in the Division of Consumer Affairs, where we have all of these other agencies that are regulating the professions? Where is it going to be?

And I'm really concerned about whether we are -- and how we're going to -- how you can assure us that we're really going to see some enforcement of the standards we're setting for these professionals. In my limited experience here in the Legislature, I haven't -- I have to say I haven't been impressed with the kind of enforcement we've seen out of some of these other professional boards, whether they're applying to health-care providers or the regulation of cemeteries. A wide range of regulated industries really don't get too regulated. How can we be assured that these licensed site professionals are going to be penalized if they don't do a good job so that we don't have more Ringwoods?

ASSISTANT COMMISSIONER KROPP: Your concerns are one of the reasons that we're not recommending a board at this particular point in time. In discussions with the Massachusetts program, they have concerns with their board in terms of being very slow to act and make decisions, although they have revoked licenses, suspended licenses, and issued penalties. Because the board is made up of a variety of individuals, it doesn't move as quickly in terms of coming to conclusions with enforcement. That's why, right now, we're recommending that all enforcement and licensing of individuals happen within the DEP. And the enforcement program and the site remediation unit would be expanded to handle the enforcement, the revocation, and suspension of licenses.

But we also talked to other groups, other than Massachusetts, that deal with boards -- some of the DEP agencies that deal with boards. And that's why we're not recommending, at this particular point in time, to go with a board.

SENATOR GORDON: Second question: Also, one of the stakeholder groups dealt with the problems of historic pesticide contamination. We're finding remnants of pesticides around schools. Today's *Record* has a front-page story about the dieldrin at the local pool in Paramus. What kind of assistance will you be providing municipalities and school districts in identifying whether they, in fact, have these problems so that they're not uncovered on an ad hoc basis?

ASSISTANT COMMISSIONER KROPP: First of all, thank you for attending the stakeholder sessions. It was very nice.

One of the things that we're doing right now is, we have guidance that is out on our Web site that deals with historic pesticides -- how to identify historic pesticides, how to sample a school or property in order to determine if there's a problem, and what some presumptive remedies are -- primarily removal or soil blending.

We are looking at expanding that. We have a community relations group that goes around and does presentations for municipalities at the request of whomever: local environmental groups, mayors, etc. So we're looking to expand that, especially in the areas where we know there may have been historic pesticide issues.

And some of the work that we're doing right now also involves our personally getting involved in taking samples, especially when there's

private wells in areas where there may have been nurseries, etc., to see if there is any contamination problems.

SENATOR BATEMAN: Thank you, Mr. Chairman.

I'd like to thank you for your testimony.

One of the most frustrating aspects of being a legislator, and I'm sure my colleagues share this from time to time with me, is when the constituents call because they are so frustrated with trying to get anything from the DEP, any permits from the simple ones to the more complex. I mean, sometimes they come see me -- it's not months, it's years. And they think as a legislator you can push magic buttons. And for the most part -- and I've got to commend Assistant Commissioner John Hazen, he's always very cooperative. But it's very frustrating, because the delay factor has such an impact on the businesses and the economy.

If you institute what Massachusetts has done, how much of that 20,000 backlog of cases-- How quickly will it take you to cut into that significantly? And how much will it cost the taxpayers?

ASSISTANT COMMISSIONER KROPP: Two things, just as an example: Right now, if you are a homeowner asking for an NFA for your homeowner tank, and you go through the typical process in the DEP -- which it goes to a field office, you sign a memorandum of agreement -- it takes about 18 months to get through the system. However, we instituted, as I talked about previously, streamlined changes in the Department, where if you use a certified, subsurface evaluator and go through our unregulated heating tank program -- which is run by one person right now -- you can get a turn-around time in days -- two to three days. So you use the certified professional, it comes into the Department, we go through a streamline

checklist review, we audit a certain percentage of cases, and NFAs are literally issued within days. That is the type of program we want to mirror for all the cases but for those really horrific cases with the really bad RPs. So we think there's about 14,000 cases or so -- excluding the 4,000 to 5,000 homeowner cases which will be going through this new process when the rule is adopted this October. Everybody will mandatorily go through the new rule process. It will help the homeowners greatly. But for the rest of the program, when we get the licensed site professional -- putting about 14,000 cases through that system. There should be no additional cost to the taxpayer, because the cost for the licensed site professionals are paid by the responsible parties, responsible entities.

Thank you.

ASSEMBLYMAN ROONEY: Mr. Chairman.

ASSEMBLYMAN McKEON: Assemblywoman Huttle.

ASSEMBLYWOMAN VAINIERI HUTTLE: I just want to get back to the dry cleaners remediation program.

Just for clarification, the PCE -- the chemical, the PERC -- is that being banned? I'm not clear on that -- if your banning that, or-- We're talking about these machines now that will remediate it -- to be able to still continue that. I'm not clear on that. Because I've been meeting with constituents, small business owners that own dry cleaners. And I have a lot of-- I'd like to have some answers to that, please.

Thank you, Commissioner.

COMMISSIONER JACKSON: I'll take that one, Assemblywoman.

There are-- The proposal today is about cleanup of releases from dry cleaners, so past releases of PERC into groundwater. PERC and groundwater mix well, and the PERC tends to contaminate a large area and is very expensive to clean up. So the proposal here today is establishment of a fund that would assist those small business owners who, as the Assistant Commissioner said, often come in. They didn't cause the release, they weren't there when the release happened. And they find themselves financially strapped in trying to deal with it.

Separate from that, there is a proposed rule from the Department that deals with banning of PERC, I think by 2021 -- by some point. I've met with probably some of the same constituents you have, and we've heard their concerns about the impact that's going to have on their businesses. And I think certainly I'm willing, as part of the regulatory process, to think about other ways to address their concerns. I think we simply need to keep our eye on the fact that whether or not there is a reasonable alternative, whether we're being aggressive with those sites that have the most potential to cause any impacts to human health -- those are what we call *colocated* dry cleaners. But I think there's lots of room for us to come to a better place.

ASSEMBLYMAN ROONEY: Chairman.

SENATOR SMITH: Assemblyman Rooney.

ASSEMBLYMAN ROONEY: We discussed this at our previous meeting, as far as the PERC. Right now, there isn't a reasonable alternative. The one petroleum-based material that they're using at some dry cleaners has a very low flash point. The flash point is somewhere

around 145 degrees Fahrenheit, which is very dangerous in a small location, a confined location. It could easily exceed that.

I've seen plans on my planning board, which we rejected, where there was -- the PERC machine was on one side of the room. Eight feet away was a boiler, or whatever it was, with an open flame. Absolutely ridiculous. I said we can't approve that, because it just -- and I asked for the flash point: 145 degrees, which was ridiculous.

So we have-- What I heard you say was that -- when there's a reasonable alternative. And that's the key, if there is a reasonable alternative. There are clean machines. We talked about this at the last meeting also, where the machine will have a lock on it until the vapors are taken through a cleaning system. And it won't open until there are no vapors left. And when it opens, whoever is unloading that machine will not have those vapors hitting them in the face. The other thing is, there's a containment area around the machine. If there's a leak, and there are cartridges -- as far as cleaning out the sludge. So there are machines. And that's where the dry cleaners should be going, to the cleaner machines.

The other issue that I brought up -- and this 10-to-the-whatever power that we're looking at-- One of the things that bothers me -- I brought it up at the last meeting. We're talking about-- And if this-- I don't know if it's site remediation, but we're talking about purity of drinking water, and the cleanliness of drinking water. Recently, we had a situation where they studied the drinking water in the State of New Jersey, and they're finding drugs in the drinking water in very small particles. But if you listen to some of the commercials that are on TV today -- what they're talking about -- one product for men. I don't remember what it was. It began with an A or

whatever. But that particular product warns that women shouldn't even touch this particular product, this drug. And they're finding that drug in our water supply.

So I'm just asking that the DEP, at this point, start looking into that. Because even minute amounts, very small amounts, of this particular drug is extremely dangerous for women.

ASSEMBLYWOMAN VAINIERI HUTTLE: Flushing it down the toilet.

ASSEMBLYMAN ROONEY: That's what's happening. It's being flushed down the toilet. But there's got to be some way to start cleaning that up and start saying, "Hey, that particular product--" If we're not going anywhere else, we should be going for those products that, even in minute-- And we've got to start looking at the -- what they're talking about, as far as being a danger to women. And that's the only one I've heard of. So I just throw that out today.

ASSEMBLYMAN McKEON: What I'm going to do -- and Assemblyman Rooney raised a great point. I think we're getting-- There's a million issues that we could all discuss here. I've got a bill sponsored with one of my Republican colleagues to deal with a study commission on that point.

ASSEMBLYMAN ROONEY: Not me.

ASSEMBLYMAN McKEON: No, not you.

But if we could-- If anybody has any more specific questions of the Commissioner and the Assistant Commissioner--

If not, we have a lot to get through and we promised, in deference to everybody's time, to be out of here at 1:30.

SENATOR VAN DREW: Chairman, on the lighter side, Assemblyman Rooney's comments -- there could be a lot of happy men and women out there. But I won't go into that issue at all. (laughter) I just--

I didn't know where you were going to go with that, Assemblyman.

ASSEMBLYMAN ROONEY: No, no, no, this is serious.

ASSEMBLYMAN McKEON: And it is.

Commissioner, thank you so very much for your leadership. I think it was Senator Van Drew who suggested -- or one of my colleagues -- that it took a lot of courage for you and the Department to come forward to tell us that we need a fix. And I think we are all poised, in a bipartisan, intelligent way, to do so.

Thank you both very, very, much.

First witness is Jane Nogaki.

Jane, I know you had said you had one or two people with you. Obviously we just have three chairs here.

So if there's a particular group I'm calling -- if you have one or two individuals with you, please feel free to bring them up, and I'll leave it to you to introduce them.

I also want to now remind everybody, mindful of everybody's ability to have some input, that we're on our 10-minute time limit.

JANE NOGAKI: No, I believe you're going to call on Olga Pomar and Roy Jones separately.

Is that correct?

ASSEMBLYMAN McKEON: Yes, we are. You are right.

MS. NOGAKI: Okay. Thank you.

My name is Jane Nogaki.

ASSEMBLYMAN McKEON: Times up. Next. (laughter)  
That's what happens when you correct the Chairman.

MS. NOGAKI: I don't talk as fast as Dave. But he is down in Washington, D.C. today, testifying at a committee meeting with Senator Lautenberg on the issue of pharmaceuticals in drinking water. So that's why he's not here and I am.

So we join with other environmental groups here today -- New Jersey Environmental Justice Alliance and the Sierra Club -- urging you to move legislation in the strongest possible form to reform the Site Remediation Program. We're a bit concerned that a partial remedy of fixing just a couple aspects of the reform, and not doing total reform of Site Remediation, will actually harm the program, because we think that a total makeover is really in store here. And so the timetable that you've suggested to have this done -- part of it done by the Summer, and the rest of it done by the end of the year -- we just encourage you to look at the total picture, because so much of this program is integral and interrelated.

We want to ensure faster and better cleanups, not partial remedies in every sense of the word. This is as much an environmental justice problem as a public health issue. We know that no town is untouched by contaminated sites. Every town has in the teens or twenties of contaminated sites. But in our urban areas -- particularly where people of color, people in poverty -- they are faced with hundreds of these sites. And therefore we think that the commitment to prioritize sites, to affect people who are worst exposed by multiple sites, needs to be looked at.

Right now, these sites are a piecemeal approach. They're not looked at in conjunction with other risks in the community. And therefore, our urban and poor residents are more grossly exposed to contaminants. This needs to be addressed.

The thing that we are concerned about is that DEP actually has some powers to ramp up their program; they had the ability to enact treble damages. They can increase this (indiscernible) fund tax and other polluter-pay mechanisms. There could be cuts in Christmas tree items in the Legislature, pay to play, and subsidizing sprawl -- would go a long way to improving resources to get the staff that we need at DEP.

We oppose the privatization or use of licensed site professionals as an organization. We don't think that licensed professionals would have the same mission, the same mandate, or the authority to protect public health and the environment, which is the responsibility of DEP. In the end, this is DEP's job. We want people working for the DEP to do the investigations and to sign off on them, not to hand that over to someone else who doesn't really, in the end, have the authority, the mission, or the mandate. We don't think it's in the public interest to have this kind of privatization or licensed site professionals.

Any insurance scheme that is used to pay for failing caps, we think, should be paid for by the polluter, not the public. We think that public funds should only be used when there is no responsible party, or emergency cleanups where the responsible parties can be attached later on.

The thing that DEP lacks -- actually, the crux of this problem is, they lack the authority to bring a polluter to the table. So many of these clean-up situations are voluntary. They're waiting for the party to come to

the table, waiting for them to enter into a consent order. DEP needs more authority to go after a polluter and make him clean up a site on an aggressive basis.

Right now, the DEP lacks the power to compel a polluter to do a feasibility study to look at alternative sites and select a remedy the DEP thinks is protective. They depend on the responsible party to select the remedy.

Right now, DEP lacks the authority to consider health risks of cumulative exposure or multiple contaminants at multiple sites. They look at one chemical at a time and assess that one-in-a-million health risk. But if a site has a hundred contaminants at it, 50 contaminants, they don't look at that multiple, aggregate, cumulative exposure. They need to be able to do that. They're actually now prohibited from looking at that in the Brownfield Act.

They lack the legal power to enforce clean-up standards for ecological impact. They can only compel additional cleanup if it can be proved that the cap or institutional controls have failed, placing a burden on the DEP to show harm.

And also, a major flaw of the program is that public hearings and public notification is not required at contaminated sites. There's no public process. That's why things get built in places where-- If you ask the neighbors, they would know that something bad had gone on there and pinpoint it out. These transactions take place under cover of private offices, not out in the public view. So therefore, any reform that takes place here needs to emphasize permanent cleanups, not temporary cover-ups.

At one of her earlier meetings, Lisa Jackson referred to the pave-and-wave kind of cleanup, where people are just paving over a sight, or putting a couple feet of clean fill over the top, and saying, "It's clean. Goodbye." This kind of remedy has got to stop. Eighty to 90 percent of the cleanups in this state are happening in that way. They're not removals, they're not actually cleaning up a site, they're covering it over. That is not acceptable, especially not acceptable in residential areas where schools are being built, where day cares are being built, where people are going to be recreating.

Therefore, we think there should be an absolute prohibition of these kinds of cleanups and that you should never site residences, schools, recreational facilities on landfills or these paved-over sites.

We think that more public involvement is needed not only in the remedy selection and notification of hazardous sites, but also in the redevelopment plans. The community is going to be living with these sites, and they need to have a say in what the redevelopment looks like.

Ensuring environmental justice is a key component here. We need those stringent, health-based cleanups in environmentally burdened communities that are experiencing multiple exposures from industrial facilities, as well as numerous contaminated sites.

We think that prioritization of these cleanups, not privatization, is important; and that using protective, health-based standards -- as Senator Gordon mentioned -- using precautionary principle-- If we don't know what a chemical does, if we don't really know what the health risks are, we should aim for zero on these chemicals. We don't know what the mixtures, the aggregation of these chemicals are.

And certainly the Department could benefit from increased enforcement. Pulling back on these voluntary cleanups -- which always happen too little and too late -- DEP could increase their field presence, assess treble damages, enforce clean-up standards for ecological impacts. DEP has yet to activate its ecological task force, which was supposed to happen 14 years ago.

In conclusion -- I know my time must be coming near -- we support legislation that will give DEP more authority to compel responsible party and permanent cleanups. We don't think pave and wave capping is an appropriate cleanup. And we think it's certainly inappropriate for day cares, schools, residential, and recreational uses of a site. We don't support privatization or licensed professionals.

We do appreciate the Committees' attention to these comments. I have listed a number of examples, which you're very familiar with: Kiddie Kollege; the building of an early childhood development center in the city of Camden on a known contaminated site, a school that failed once already and had to be knocked down and is being rebuilt on the exact same site; many other instances -- the mercury poisoning in Hoboken -- are examples of the failure of the program.

And so with the reforms in mind, we urge you to look at the whole picture. We've also attached comments from 11 environmental groups that were submitted to the DEP after the stakeholder process and after these white papers were drafted. We have specific recommendations that deal with school site remediation, historic pesticides, remedy selection, institutional controls, and so forth. And they're attached to your comments which I've submitted.

So thank you very much for your attention. And we will, of course, be watching and participating in this process as it moves along.

ASSEMBLYMAN McKEON: Thank you so very much for your learned testimony.

Any of my colleagues have any questions for the witness? (no response)

Seeing none, Senator.

SENATOR SMITH: Tony Russo, Site Remediation Industry Network.

Mr. Russo.

**T O N Y R U S S O:** Good morning.

SENATOR SMITH: Good morning.

MR. RUSSO: I'm here today--

My name is Tony Russo, and I'm here today because, obviously, the Site Remediation process is broken, as was evident in the Commissioner's testimony.

The fact that you have 20,000 cases -- some of which have been open now for more than 20 years -- is evident that the process is broken and it needs to be improved.

The group that I represent today, the Site Remediation Industry Network, or SRIN for short, cares about these sites, and they strive to put these sites back into good use and also strive to clean up these sites as quickly as possible to protect the public and the environment. The professionals within this organization literally manage hundreds of cases on a daily basis, and they're recognized as technical experts in this field. And

we are very excited about this opportunity to bring real reform to the Site Remediation Program.

SRIN -- we did participate in the stakeholder process last year. We attended every single stakeholder meeting; and we actually developed a booklet, that I'd like to hand out today, which really just details and summarizes our positions on the issues. And my colleague will pass that out.

Basically, there were four themes that I want to touch on today. And throughout my testimony-- And, again, I will be brief. I will stay within my 10 minutes. It's important to remember the four themes that I'm going to talk about if we are really, truly going to have real reform in the program.

The first issue, or obstacle, to site remediation in New Jersey is the process. And I think the Commissioner touched upon it, and some of the questions that these two Committees raised touched on it. What is the process? The fact that the DEP needs to approve every report, every letter, every step of the way means that sites can be cleaned up. I mean, that's ultimately what happens. So you have to ask yourself, "What is it about the process that we can improve and streamline?" You might hear some folks say that we're going to want less oversight and that the process should be streamlined and removed. And all we're really asking for is the right kind of oversight at the right time.

The second issue that I want to raise is the one-size-fits-all. And this ties into the process. And this is an interesting point to raise: the fact that a homeowner case is treated the same way that a large industrial plant is treated, in terms of the process and what's required, as far as

reports, just doesn't make a lot of sense. It results in a lot of needless paperwork that's submitted. There has to be an appreciation that every site out there is unique and different. And as far as what's required at each site, there has to be flexibility in the program that would allow for that. So the one-size-fits-all approach just really doesn't work. And again, that ties back into the process.

The third issue -- or the third theme again -- and this is really just -- keep in mind, it's really to improve the whole program, and get away from that backlog of 20,000 cases, and put sites back into good use, and protect the public -- is accountability. So as far as the third issue, it's the fact that the Department does not have an established metric right now to measure success in the program is interesting in the sense that-- What is the goal of the Site Remediation Program? It should be about, again, putting sites back into good use and cleaning up contaminated properties.

The fact that there is no prioritization in their cases, that each case manager has about 300 cases that they have to manage on a daily basis-- What that results in is-- It's almost impossible to react to every report, every document that's submitted. And really what that leads to is a need for, again, streamlining the process and the one-size-fits-all. So if you develop a metric for the program, change the process, we feel strongly that you're going to see an improvement and that backlog will shrink.

And then the last major theme, before I react to the Department's testimony on some of the issues, I want to raise is the leave-no-molecule-behind policy. And I think Senator Gordon touched on this, as to whether or not the standards are achievable. And I'm talking about not only soil standards but groundwater standards.

A lot of times -- or I should say a lot of cases out there are in this endless loop of pumping and treating groundwater, sampling their groundwater, and they just can't attain the standard. And that standard, you have to keep in mind, is based on a lot of factors, not just human health, but also aquatic, and environmental, and ecological factors. So you could have a standard as low as one-part-per-billion. The fact that laboratories have difficulties detecting that one-part-per-billion should raise the concern. And the concern should be: Are those standards achievable? Am I going to have companies-- Again, in this endless loop of sampling and pumping groundwater in areas where the groundwater is not used for drinking purposes, the groundwater doesn't impact surface water -- and yet, because of the way the process is set up, they can't cross that finish line. They can't get that no further action letter. So you have to say to yourself, it's not about lowering standards, it's about are the standards achievable.

So we hope that you take a step back and at least appreciate the fact that there's a lot of sites out of that 20,000 that probably fit that category, where they're minimally above the standard and they could reach a point where they could cross that finish line; and that site gets sold or put back into good use, and, more importantly, frees up the Department's resources.

And one thing I want to stress there -- and I know this is something that has been talked a lot about -- is, you really have to look at the uses of a property and the risks associated with that use. And as long as there's a mechanism in place which protects that use, and the public, then sometimes that risk is minimized, and that case should be closed out.

I just want to react quickly to the DEP's testimony today about the licensed site professional program. The fact that the Massachusetts model, as a whole, is not being adopted here -- and, more importantly, that gets to the risk-based corrective action approach -- concerns us. We support it, conceptually. It makes sense when you want to try to reduce the backlog.

What we fear though, and what we want to guard against, is a lot of the inefficiencies, which I just described with the process, the one-size-fits-all, the standards -- that those inefficiencies aren't then transferred over to the LSP and we're in the endless loop of not crossing that finish line. So we want to guard against a couple things: one is what I just mentioned. But also, if it's truly going to be a licensed site professional program, we want to hold the consultants responsible. The DEP's oversight should be limited to auditing those projects and issuing the no further action letters. If it deviates from that, and we still have Department oversight on a lot of these documents -- if the process doesn't change, we haven't moved the ball down the field. And I'm afraid that we'll be back here a year from now, arguing the same type of situation.

Real quick on remedy selection for sensitive uses: I mean, that makes sense. A lot of the people that I represent go above and beyond with the standards if there are any sensitivities there. So obviously we feel that the Department has the current authority in the various enabling statutes. But we would not be opposed to provide a new additional authority for those sensitive uses of those properties.

One thing I do want to mention about the 1 percent surcharge-- And the way it typically works right now is, when you open up a case within

the DEP, you're obligated to provide that funding source. And a lot of people either do the line of credit, buy insurance, secure a bond. But a lot of the people that I represent -- large companies, corporations -- self guarantee that and, as Assistant Commissioner Kropp mentioned, they're exempt from paying that 1 percent surcharge. If the statutes are now amended to apply that 1 percent to these self-guarantees and do away with self-guarantees, that's a lot of money that's going to be generated that's going into a fund to help the recalcitrant parties out there who walk away from their responsibility to maintain and control that cap. And that's going to be a big impact. And I think you need to appreciate the fact that, again, that's a lot of money. I know the Assistant Commissioner mentioned \$14 million. I'd be curious to see if that number is accurate or not.

And it really is, when you boil that down-- If they're going to go in that direction, that really constitutes a tax, another tax, on the responsible party which -- and I want to briefly mention -- that they already pay the Spill Tax, the Corporate Business Tax, and now this will be a 1 percent tax on their cases.

Engineering and institutional controls: We support the permit process that's going to take place, where the responsibility of who maintains that cap is carried through. So we support the Department's position on that.

But just to conclude, again, it's about the process, improving the process, it's about putting sites back into good use. And if legislation is enacted that doesn't touch upon those four themes that I brought up, I'm afraid that we'll all be back here a year from now talking about the same thing.

So thank you very much.

ASSEMBLYMAN McKEON: Thank you very much.

Any of our colleagues with questions of this witness? (no response)

Seeing none, Jeff Tittel of the Sierra Club.

**J E F F T I T T E L:** Thank you.

I'm glad we're having this hearing, though I wish we were more advanced in making the reforms that needed to be made.

I just wanted to start out and say that I think one of the biggest problems that we've seen in the last 10 or 12 years is that the whole concept has moved from cleanup to development. And in that process, a lot of things have slipped through the cracks. And for us, when we look at what's happening on these sites, we want to make sure that they're cleaned properly, not only because of the environment, but because of the economic viability of sites. If we have more disasters like an EnCap or a Kiddie Kollege, it undermines the whole concept of trying to build on brownfields because banks, developers, and others who we like to see invest in these locations will not, because they're afraid that some kind of disaster could happen in the future. And I think the reason that we'd fix these programs is, one, to protect the environment; but two, to make sure that these programs could really work. Otherwise, if we have more disasters like an EnCap, we're not going to see development on brownfields, because people are going to be afraid to touch them or live on them.

So I just wanted to start out with that, and just give a couple of comments on some of the things that I've heard today.

We think that this concept of sort of outsourcing responsibility, as in Massachusetts, is another one of Mitt Romney's ideas that doesn't really work quite right. And, in fact, when you go on the Web site and you look at the most recent audit, you'll see that on Level 3 contaminated sites, 21 out of 30 sites where they actually did a fiscal audit -- a real audit -- failed, found some serious problems; and on Level 2 sites, 24 out of 89. So we have real concerns there.

I do agree with Senator Smith that if we're going to allow for any type of consultants, that it has to be through an escrow system. You do not want the responsible parties directly controlling those consultants that are in charge of those sites, because there's the potential for a lot of abuse. And I think that's absolutely true.

One of the things that we believe has to be done is, we need to have a real prioritization system. Currently, there really isn't one. It's a first come, who knows who gets served kind of system. And I think we really need to see a real prioritization put in place going after some of the most contaminated sites first, as well as those sites that have been most ready for redevelopment. I think without that, we spend a lot of time spinning our wheels.

We have real concerns with the concept of caps. We believe for schools, and housing, and other kinds of public facilities we have to have permanent remedies, not just enhanced remedies. And the reason is that caps will fail, institutional controls will fail. And when you see what potentially could happen when you have families living on those sites, I think it raises a real concern.

We've also seen, firsthand, in Newark -- in the Ironbound section -- people digging up their caps, and rototilling, and planting vegetables, because that's part of their culture. And there is no mechanism to make sure that doesn't happen. And I think the safest way is to make sure we're not building houses in the Ironbound section on top of sites unless they're really clean.

We also believe that another problem we see with capping is that many times the caps themselves become a place to get rid of low levels of contamination. And so if you looked at EnCap, when they brought in dioxin-contaminated (indiscernible) soils, school construction debris, and other contaminated soils, the cap itself was adding more toxins to the site. And then you're going to add residents. And that's one of the problems: that if you're going to be capping a site, it should be capped with materials that are going to be protective, not just a place to get rid of some low-level kinds of contamination.

The other concern we have on having these restricted sites is that -- is to have a mechanism to make sure that someone doesn't come in and build warehouses, and 15 or 20 years later someone comes to build condos. We see these things starting to happen now. And there has to be a mechanism to make sure that if you're coming back, that you have to do another kind of cleanup and assessment on that site. Because, again, the concern is, what happens to the people that end up living on those sites?

There's a lot of others areas that I wanted to kind of get into real briefly. And one is vapor intrusion. And one of the reasons you go after groundwater is because of the vapors. And one of the things we should be looking at, again, for residences and schools is to put those

safeguards in place. When you look at certain chemicals, like chromium-- Chromium turns from a very benign form of trivalent to the toxic hexavalent because of groundwater. So, again, getting at groundwater cleanups and making sure we do it is important.

And it's one of the reasons you go after those sites, Senator Gordon. Because even though those areas aren't used for drinking water, the groundwater will move those chemicals into other sites, as well as change them into a more damaging form of the chemical.

We also just wanted to go through a couple things that Lisa Jackson said. Again, when you look at the Department, I think one of the biggest problems that we have is that there is not enough staff to do the job. And when you go back and you look at the number of people who were in as case managers, I believe in 1993-94 you had 270. You're now down to 170. So part of it is to give the Department the resources to do the job, otherwise cleanups will continue to lag, and we will continue to have toxins getting into our community and our environment. And I think that even if you do any kind of outsourcing or whatever, you're not going to get to that kind of backlog. So I think having those resources and going after the polluters is really an important part of that part of what we need to see in DEP.

We also think that the Department needs to have more authority in choosing remedies, and it has to be clear standards and guidance. And part of the reason that it takes so long now is the back and forth between the site managers -- the case managers from DEP, the consultants for the responsible party; and so coming up with a remedy. And I think having a clearer system would work.

One of the ideas that I would put forward is that if you go to an unrestricted cleanup -- meaning going to the highest standard, especially for residential -- that you go through the system quicker, because it's going to take the least amount of engineering and site review work to do that type of cleanup. And I think that we need to make sure that as we're going to change the program, hopefully we make it better and not worse.

Thank you.

ASSEMBLYMAN McKEON: Jeff, thank you very, very much.

Any of my colleagues have questions? (no response)

Seeing none.

SENATOR SMITH: Our next witness is Andy Robins, from the New Jersey Builders Association.

**ANDREW B. ROBINS, ESQ.:** Thank you.

Our prepared remarks were circulated earlier. I ask those be incorporated into the record.

I'm going to, in the interest of time, go to a couple of key issues.

The majority of brownfield redevelopment sites involve residential or mixed uses. The simple fact is: For all intents and purposes, you can't have viable redevelopment of brownfields without residential components as part of them.

Our members continue to bring private capital to the table to transform these sites to usable properties. Our members need predominantly three things: transparency, predictability, and finality so that they can safely develop these sites. The system now works to some degree. There's definitely room for improvement.

The key though is -- for these different issues that have been raised -- is how they will be implemented. I'd like to tick off one or two. The first one I'll start with is remedy selection, the concept that you need to have the department with authority to choose the remedy. That, in concept, can work and in other concepts will not work. It could work if the Department's idea of remedy selection is to let people know up front what remedy is needed for what type of use. If, however, the Department is going to go through the process of sometimes late in the game coming forward and saying, "We recognize there are a variety of safe approaches here. We like this safe approach better," that destroys predictability. And if you can't have some level of predictability in developing a property, you can't move forward, you can't get private capital involved. So if remedy selection is on the table, and it involves a set of standards that you have to meet, and you know what those standards are up front, that's one thing. That could be viable. If, on the other hand, it's leading the party into the process only to change what the remedy might be years into the process, that won't work.

The second concept I want to hit upon is the concept of what's been described as *pave and wave*, the use of engineering and institutional controls, what we commonly refer to as *caps*. And there are a couple of myths out there. One myth is that caps fail. The second is that *pave and wave* is the approach, and that is an extraordinary disservice. It's a disservice to the Legislature that established the means to have flexibility for certain sites. It's a disservice to the Department that reviews these sites to make sure that they're protective of human health and the environment. And it's a disservice to the people who go through the process to determine

that the economic viability of doing the cleanup requires that some material remain behind. It's also a disservice, because you have to look at the alternative to what capping is, and that is to dig up the material and to dump it in someone else's backyard. The alternative of digging and dumping is environmentally imprudent. Digging the material up, when it can remain behind in a way that is protective of human health and the environment, means that you're running risks in digging it up, you're increasing risks in transporting the material, and you're increasing risks in putting the material in someone else's backyard where it has to be dealt with. The basic principle of science is that you can't destroy mass and you can't destroy the material -- it has to go somewhere. And filling up our landfills with material that can remain behind safely doesn't make any sense. It has to be rejected if we're serious about redeveloping brownfield sites.

We are in favor of making the concepts more transparent and easier to follow for greater clarity. The type of permit process that could be developed can be viable. And, again, the devil will be in the details for that type of program.

I also want to touch upon -- briefly on the process. Our members both remediate sites and buy sites that have been remediated. The predominant need they have is to know that they're building a product that is both economically viable, more importantly safe for their residents. They're not in the business of building properties only to have the property become a problem later. Beyond the moral issues, there's the economic aspect of those as well. Once you build a project, the last thing you want to

do is to have to be involved in years and years of lawsuits for what would have been a successful development.

But right now, the process that we have doesn't give that level of finality. There's a need to reassess. And some of the ideas the Department threw out today need to be analyzed more fully -- but to allow for finality. Our members aren't the people who put the material there in the first place. They're coming there to redevelop the property, to add private capital, to address what had been our state's legacy. We're trying to move the properties forward. But right now the process is so cumbersome, so overwrought with duplicative standards and duplicative reviews, that it makes the process so hard to follow that it dissuades private capital from getting involved.

What we don't need to do, though, is to add to the complexity. So requiring for a review in certain circumstances that might add to the delay -- and I don't know the details, because we haven't had the details from the Department yet as to how additional notifications or limitations on certificates of occupancy would be worked. But adding to that process to make it more cumbersome and more complicated is a step in the wrong direction.

I could sum up, unless you have questions, that the amount of land for development has continued to be constrained. And as that has happened, redevelopment of brownfield sites has been held out as one of the primary opportunities for growth in this state.

The issue before us is whether we move forward with the Site Remediation Program making improvements, or whether we take steps backwards to slow the process down or make it more complicated.

We look forward to the opportunity to work with you and with the Department to try to move forward.

SENATOR SMITH: Any questions? (no response)

Thank you so much for your testimony.

Our next witness is a tag team: Olga Pomar and Roy Jones, from S.J. Legal Services, and S.J. Environmental Justice Alliance.

**O L G A P O M A R, ESQ.:** Thank you very much for giving us the opportunity to speak.

I'm Olga Pomar. I'm an attorney at South Jersey Legal Services. We provide free legal services to low-income communities throughout the southern counties of New Jersey. With me here is Mr. Roy Jones, who is the Executive Director and Co-Chair of the South Jersey Environmental Justice Alliance, one of the client groups I represent.

We're sharing our time, so I will try to be very brief.

I do have written comments that are more detailed that, if I may, I would like to leave for the Joint Committee members.

I want to touch very briefly on the following five topics: to remind this Committee why site remediation is a particularly important environmental justice issue; to talk about remedy selection, public participation, prioritizing sites, and cumulative impacts.

I know this Committee's aware that low-income communities of color are the ones that are hardest hit by the problems of contaminated sites. Just to give you a few examples: In Camden City, we have 114 known sites that are on the DEP's list. Two of those are superfund sites. We have an additional 94 suspected sites on the DEP's list. And we have God knows how many sites that no one has ever checked out and

investigated. So these sites are next to schools, they're next to residences, they're near playgrounds. Children are constantly at risk. They're unmarked, no one knows they're there, kids can play on them not even aware that they're touching contaminated soil. We have very poor enforcement. Some of these sites have been created, under DEP's watch -- if junkyards, scrap yards, recycling facilities are contaminating the ground -- through the polluting uses right now that are going on.

We know there is a real health toll for this. Camden City has elevated cancer rates, especially for lung, stomach, esophageal cancer. It's important to notice that while in the nation and the state cancer is the second-leading cause of death, in Camden City it's the first leading cause of death. And while we have no testing done to know whether any of the residents are being exposed to contaminants, we know there is a correlation between living with contamination and real health harm.

Of all the topics that were discussed and that were emphasized by Commissioner Jackson and Assistant Commissioner Kropp, one of the most critical ones is to restore the DEP's authority to mandate proper cleanup, not to leave that decision exclusively, or almost exclusively, with the responsible party -- the developers who naturally are seeking to contain their costs. Our current system, where the developers have the ability to pick sites, has resulted in using capping in over 90 percent of all sites. This is a short-sighted remedy. Caps are, by definition, temporary. They require constant maintaining and monitoring. It's a short-term solution where, ultimately, these caps are going to fail, and we're going to be living on a toxic soup of chemicals under the ground.

In Camden, even sites like an early childhood development center and a recreation area being built by the Salvation Army are being built on landfills using minimal caps.

The Senator questioned the DEP representatives as to not only regulating sites, in terms of end use, but also toxicity. Well, if the DEP was given authority to require certain remedies, then part of that remedy could be removing the most toxic hotspots of contamination. There should be a level at which contaminants can't remain in the ground that's going to be used in an urban area where people live, and work, and recreate. Right now, capping can cover even the most contaminated and most toxic sites.

Related to remedy selection, it's critical that there be some public input into that remedy selection. We've talked about giving notice to municipal officials. But it's really the residents of these communities that have to live with the health harms of these sites. And they're the ones who are going to be most affected by the reuse of this site. Right now, there is no system for public notification. All the decisions are negotiated behind closed doors. The DEP has proposed regulations to improve notification to the public. But unless the public is brought into the remedy selection process, unless they're allowed to have input as to how the site is cleaned up, that public participation is window dressing. It's not real.

And just to sum up, two other points. As other speakers have stressed, the key is prioritizing sites. Right now, market economics drives what sites are cleaned up. And some of the most dangerous toxic sites that are contaminating drinking water, that are leaking into people's backyards, that are under schools that children are currently attending -- they're not being cleaned up, because the market economics aren't dictating it. DEP

has to prioritize what sites pose the most dangerous health risks and do the most stringent enforcement against the responsible parties.

And cumulative impacts are a huge issue for environmental justice communities. In other communities, you might have one contaminate of concern or one dangerous, nasty site. In a place like Camden, or Newark, or Penns Grove, or Salem, or Trenton, you're bombarded by chemicals from the air, the soil, the lead paint, everywhere. Right now, ISRA does not allow cumulative impacts to be considered. That's major legislative reform. If the DEP moves forward toward developing a system for evaluating cumulative impacts, right now the law wouldn't allow them to implement that system.

So I will stop here and turn it over to Mr. Jones, who I know wants to speak about the particular issue of schools on contaminated sites.

**ROY L. JONES:** Good afternoon.

**ASSEMBLYMAN McKEON:** Mr. Jones, as important as it is, I'd ask you to try to keep it to five minutes, because I didn't -- I was counting your 10 together.

**MR. JONES:** All right. I want to put a human--

**ASSEMBLYMAN McKEON:** You need to hit your button on your mike, sir.

**MR. JONES:** I want to put a human context on this issue of site remediation reform.

And one of the things I want to really make a point about -- and that is, in this state, thousands of sites are built near schools, and many of these sites are contaminated. And one of the things that struck me over the last year was when 32 children were affected by mercury contamination

in Franklin Township -- Franklinville, New Jersey. The legislators from that town rushed to hold hearings and to push past legislation on the issue of day care centers. And on the one side, that's a very good thing, and we applauded that. And we were there at those hearings in support of the people in Franklin Township. But at that same hearing, we were relegated to the end of the day, after nearly 10 hours of testimony, when we wanted to talk about the issue of schools generally throughout the State of New Jersey, and that day care centers were not just one of those issues that we needed to deal with.

So many people in my community and many environmental advocates are very concerned that there was legislation passed dealing with day care centers. But the issues, as it relates to schools, and schools that are near contaminated sites, or schools that are built on contaminated sites -- we have yet had legislation pass on this particular issue.

And the other thing that struck me was that when this issue came up about the Kiddie Kollege Day Care Center -- within nine months, legislation was passed on the issue of day care centers. And in our community -- in a community like Camden -- in our school district, there are 20,000 kids, and there are literally 50 day care centers. And we're talking about almost 25,000 kids that are being affected environmentally in the city of Camden. And this is just one community that we're talking about. And to this day, there is no legislation dealing with the issue of these schools and day care centers in cities like Camden.

The other thing that I want to just bring to your attention: This issue is not limited to just the city of Camden. And in my examples, I tried to bring to you 44 examples of schools in this state that are affected by

contaminated sites or are built on contaminated sites. And these schools run from a place like Camden, all the way into Princeton, Perth Amboy, and even recently, today, Paramus. In North Brunswick, a high school was affected, in Neptune oil was found on the land where a school was built, at the Ramapo Middle School there were also issues with contamination.

And so the point I'm trying to make is that we need legislation to deal with this issue. And one of the flaws in the legislation that we all -- many people -- advocates agree-- I want to read at least three things we think are some of the flaws. In the current legislation, it doesn't cover existing day care centers and schools. Also, the remedy of capping sites doesn't protect human health, nor is it the highest standard. And the last point, in terms of these flaws, is that school site clean-up standards, and the training that school board members are given, is absolutely inadequate. Many of the school board members are asked to make decisions about where schools are going to be built, and they are not adequately trained to make those kinds of decisions.

The other thing that I want to read is a comment from Commissioner Lisa Jackson. She says, "Contaminants in a facility where our children attend school is frightening. And when these contaminants are above levels that can cause harm, it is absolutely unacceptable." This is Commissioner Lisa Jackson making a statement about two years ago about the issue affecting schools.

The other point that I want to make is that, at this point-- I want to talk about reforms, and I want to read off a couple of recommendations. And one recommendation is that we simply need to reform or create new laws around where we site schools and where schools

are selected to be built as it relates to contaminated sites. The other point that I want to make is that the New Jersey Attorney General should be charged with recouping funds from polluters to pay for site remediation cleanup.

And throughout today's testimony we've heard from Commissioner Lisa Jackson about some of the reforms that they are going to make. But my point today and my testimony today has to deal with schools in cities like Camden, schools in communities like Franklin Township, schools and day care centers in communities like the city of Newark, and schools in communities like -- and day care centers in communities like Princeton or Perth Amboy.

I have not seen much of a discussion on this issue, in terms of reforming site remediation laws in the State of New Jersey. And I'm here to appeal to this board -- to this Committee, to both Committees to come up with some type of response to the issue of cleaning up sites properly in the State of New Jersey to the highest standard.

At this point, when-- In Camden -- I want to just talk about it briefly, and I'm going to close on this. One example was a particular school called the ECDC School, the Early Childhood Learning (*sic*) Center. And this school was built on a landfill. And later, the school started to sink. After the school sank, and the walls cracked, the school had to be demolished. Well, the School Development Authority and the New Jersey Department of Environmental Protection decided that the best remedy, in terms of cleanup for this particular site, was to use capping to remediate the site. And today, the school is now being built in the city of Camden. And we are in the process of trying to alert the school board and to alert parents

that capping of this site, which was a former landfill, and which had arsenic in the ground at a thousand times the national standard, is not sufficient and ultimately compromises the integrity of the school, and the children, and the employees that go to that school.

So I would appreciate it if this board -- these Committees would look into this issue of the ECDC School in Camden and address this issue in your site remediation reform efforts.

Thank you very much.

ASSEMBLYMAN McKEON: Thank you, sir.

Any questions?

Assemblyman Rooney, we want everybody to keep in mind that a lot of people want to testify.

ASSEMBLYMAN ROONEY: Just one comment.

As far as some of the sites I've been involved with, what could happen -- what could help is if you, Mr. Jones, look in your municipality in Camden, find out what was there previously. You could always help the DEP. Because one of the things we did was, we tracked it down in my community. The DEP never found the PRP, but we did. The Borough of Northvale actually found the party. We got them. In fact, the DEP collected, I believe, around \$3 million in cleanup from them. But it's a partnership. The DEP can't do everything. And I'm seldom accused of defending the DEP. But in this particular case, I will absolutely defend them. They can't do everything, as evidenced by this hearing. They've got 20,000 sites. You in the community have to help. You have to track down who was there previously. You have to give that information. And if we

work as partners, we can do some of the things that are necessary to get the cleanups.

That's all I have to say.

MS. POMAR: That's one of the reasons I think it's really important that we enhance the public participation piece in site remediation, because that's really missing.

MR. JONES: And, Assemblyman Rooney, can I just say this: In terms of the Kiddie Kollege situation, and the issues that were brought to you about Camden schools-- There's a big gap between what happened at Kiddie Kollege, with 32 kids, and legislation was passed; and 500,000 kids in the State of New Jersey with no legislation addressing those issues for schools in urban areas. There's a big gap. And I would appreciate it if this Committee were to deal with those issues.

ASSEMBLYMAN McKEON: Thank you, sir. We appreciate your passion and professionalism.

Mike Egenton, of course from the New Jersey State Chamber; Jorge Berkowitz, of Langan Engineering; and Dave Brogan, of NJBIA.

Mike, if you want to lead us off, that's good.

**MICHAEL EGENTON:** Yes. Thank you, Chairman.

We appreciate the opportunity for us to provide comments today.

As you know, I'm Michael Egenton, Vice President of Environment and Transportation with the State Chamber of Commerce. And joining us up here today is Dave Brogan, from NJBIA; and Jorge Berkowitz, with Langan Engineering.

I just wanted to also say for the record that we support the previous testimony that was submitted today by SRIN, by Tony Russo. And it's the Site Remediation Industry Network. And then you'll hear comments later on from another group called TRAC, which is the Technical Regulations Advisory Coalition. And that will be provided by Steve Senior.

Chairmen McKeon and Smith, and members of the Committee, the State Chamber embarked, several months ago, on a site remediation benchmarking study. I won't go into it, but I will provide electronic copies to the legislative staff and make sure that you get copies of it. But in a nutshell, as you heard here today, we found out that the process is broken. It takes too long to turn properties around and to get decisions made.

Obviously, in doing the benchmarking study, we did look at other states and how they're doing things, such as the LSP program in Massachusetts. We conceptually support what was being offered here today, but obviously the devil is in the details. We will provide further comments once the legislation is available.

The bottom line for you to keep in mind is, if we improve the process it will essentially be a win-win for all. If we clean up old brownfield sites that can be turned over to viable properties, and put those sites back into productive use, and obviously give local municipalities an opportunity to collect more ratables in these tough economic times; or like was done in my municipality, we can turn the property over to an open space or park -- obviously left to the decision of the locals.

With that in mind, because of the diversity of our membership within the State Chamber and NBIA, we have asked Jorge Berkowitz, of Langan Engineering, to provide specific testimony on our behalf. Jorge is

also providing the testimony for NAIOP. Jorge is essentially an individual that's in the trenches and has extensive experience and knowledge of the system and the challenges he faces with the process at DEP.

I'm going to ask Dave Brogan to say a few brief comments, and then Jorge will take the bulk of the testimony.

Thank you, Chairmen.

ASSEMBLYMAN McKEON: Michael, thank you.

**DAVID BROGAN:** Thank you.

Dave Brogan, from New Jersey Business and Industry Association.

As Mike said, we asked Jorge to go into detail.

But just briefly on the licensed site professional program, we feel that if it's done the right way it can be a critical component of an implementible economic growth strategy.

As many of the members of the Committee mentioned earlier, it does create ratables, it does take development pressure off of greenfields, and cleaning up these sites does enhance the environment.

I just want to touch upon a couple of things that were said earlier. With regard to accountability: We would just ask that accountability goes both ways. The licensed site professionals are going to be held to a very high standard. And we would just ask that the Department be held to a standard, in terms of turning around -- in turn-around times for the various paperwork that needs to be submitted.

With regard to the escrow fund: We do have concerns with the Department acting as the middle man for the funds. We feel as though it would slow down the process and increase costs. We've seen some

examples with the BPU and the solar program, where companies just were not getting paid. And we fear that that could go down that path.

SENATOR SMITH: Yes, but stop for a second.

MR. BROGAN: Yes, sir.

SENATOR SMITH: What happens when the applicants for the permit don't pay the engineer?

MR. BROGAN: I can't hear you, sir.

SENATOR SMITH: Don't you see an ethical issue in the situation where-- You say you're worried that the DEP wouldn't be paying the licensed site professional.

MR. BROGAN: Right.

SENATOR SMITH: What happens when the applicant doesn't pay the licensed site professional? It says you either write the right report or we don't pay you. Isn't that an ethical problem?

MR. BROGAN: Well that can happen in any-- An ethical problem?

SENATOR SMITH: Yes.

MR. BROGAN: It's a litigation issue. I don't think it's an "ethical" problem.

SENATOR SMITH: Well, remember the point on this was to try and speed up the process. We don't want litigation.

You've seen the process at the local level, where there's an escrow collected and the town then hires its own professionals to review an application. The towns, once they get billed, pay it promptly. The State of New Jersey can do that. Don't you see the bigger problem where the licensed site professional is paid directly by the applicant? Don't you think

there's a possibility that perhaps the report may be pressured in one direction or the other?

MR. BROGAN: Well, the licensed site professionals are going to be held accountable. And I know that you're going to increase the penalties -- the criminal penalties, the fines. I think that can act as a disincentive -- enough of a disincentive to counter the "influence" that might be had.

We just feel as though if you have money going into a fund that DEP is overseeing, and that fund's then dolling out money--

SENATOR SMITH: Dolling?

MR. BROGAN: --I'm sorry, paying the licensed site professional in a not-so-expedited manner, it's a problem.

SENATOR SMITH: Respectfully, I don't think you can have your cake and eat it.

MR. BROGAN: What's that?

SENATOR SMITH: I don't think you can have your cake and eat it. If you're looking for additional persons or expert power to move these applications along, and you're constituents are willing to pay for it, it has to be done in a manner where they're not ethically pressured. And ultimately the checkbook is the pressure. Once that first licensed site professional is not paid by one of the applicants, they all walk away from the program, saying, "What, are we nuts? We're working and we're not getting paid." You really need that honest program to make sure that they get paid.

MR. BROGAN: I understand your position, Senator.

One last thing with regard to permanent cleanups. I know that a lot of environmental groups really want to have every cleanup done to unrestricted standards. The market forces that are out there -- many of the sites just don't have responsible parties that the DEP can go after now. So the market is going to dictate whether private-sector investment goes into those sites. So if you mandate that permanent remedies be the solution, even in cases where it's not residential, you're just going to drive that private-sector investment away, and then the sites are just going to simply lay fallow. So we would just ask that you don't go down that route.

With that, I'd like to turn it over to Jorge.

**J O R G E   H .   B E R K O W I T Z ,   P h . D . :** Thank you, Dave.

Again, I'd like to reiterate that I'm here representing the Chamber, NJBIA, and NAIOP. And as such, I presume that I have 10 minutes for each, so I will take 30 minutes. (laughter)

No? Okay, I tried.

And I do want to come back to your question, Senator. And if I don't, please, let's get into that discussion afterward.

First of all, thanks for the opportunity to be heard on the importance of site remediation reform within New Jersey and DEP. Some of you know that at one time, I headed the NJDEP Site Remediation Program, for a period of time, at its inception. This goes back to the -- I hate to say it -- 1980s.

Prior to leaving the Department, I was acting as Assistant Commissioner for Environmental Control and Management. And from time to time I've been called upon to discuss with the regulated community the importance of having a strong, respected, technically astute, and

dispassionate Department. Such a department provides, to the public which it serves, that actions taken by others are neither harmful to the public's health nor the environment. In all the years since I have left the Department, I have not wavered from that position one iota.

I offer this as a preamble to my discussion so as to suggest that my recommendations would do nothing to erode the Department's authority or responsibilities. On the contrary, in my view, it would allow the Department to remediate sites quicker, more economically, and enhance environmental quality.

I'd like to talk about two major issues: lack of resources at NJDEP and programmatic reform.

Lack of resources: Given the current budgetary situation, it is unlikely that government will be able to bring in new people to staff even important programs as this. However, prior to assuming that more people are the only answer to a burgeoning caseload and an increasing backlog, one must seriously ask whether the existing program is one which is efficient and maximizes the utility of its staff. Having Department personnel do everything is no longer feasible or desirable.

I have two recommendations: create a licensed site professional program. Clearly, the Department can craft a program which relies on the considerable site remediation experience in the State to assist in site cleanups. Such a program must vet carefully those who are allowed to participate and hold those accountable for their representations to the Department. However, the Department must commit to having this program work at all levels, for it will not work in the context of command and control relationship. There needs to be a flexible partnership that

evolves. The relationship must engender flexibility and consistent communication between the parties. The effectiveness of this new effort will be in the specifics as to how it's going to be implemented. We can sit here in concept and agree, but there are programs that involve licensed site professionals that work, and there are programs that involve licensed site professionals that do not work. Nevertheless, we strongly support the concept of the licensed professional program and encourage it's undertaking with careful crafting.

Hire external professionals to assist the Department: The Department needs help. One effective way, a way that another program in the Department has been using for nearly 20 years now, is to hire consultants to assist the various case managers to review the voluminous submissions required by the site remediation process. The cost of these professionals would be paid by the remediating party such as it is currently when the Department assesses its oversight cost. Therefore, this program would cost the taxpayers nothing. Specialized expertise can be brought in on an as-needed basis, while not incurring the cost of maintaining this individual on the payroll plus benefits when they simply are not needed. The cost of having the services of this individual comes without the encumbrances of having to provide benefits when this individual leaves the Department.

Programmatic reform: The state is being cleaned up by private parties, not the government. In a large measure, this was done because the land being cleaned up was extremely valuable. The economy has changed that calculus. Land values have changed precipitously. Remediating contaminated sites is a risky business. However, even with the

uncertainties in the regulatory process, brownfield redevelopers were willing to take on the task. That decision is harder today than it was six months ago. The Department and the Legislature must incentivize, not disincentivize, cleanups, because if the private remediating parties do not clean up the sites, quite simply, the job may not get done. Even if government wanted to clean up the sites, it is not efficient or equipped to do so on a wholesale basis. I know this, I've done it both ways. None of this is intended to suggest the relaxing of technically justifiable remediation standards or being less vigilant. It can mean, on balance, that more sites get cleaned up quicker with positive environmental consequences and result in sites which can safely be reused for a multitude of purposes.

I have three recommendations: introduce flexibility into the technical requirements. The technical requirements have enmeshed both the Department and the private sector in a command and control relationship. This results in protracted studies with iterative involvement with the Department and little predictability. Sites are studied, studied again, and studied even more, and then we may get around to cleaning them up.

The technical requirements are too prescriptive, period. They utilize the one-size-fits-all concept in a world where no two sites are the same. The technical requirements must be made flexible to allow for professional judgement by the case managers in their approval process. A checklist approach, rather than a literal accounting for every item within the technical regulations, would allow moving sites into remediation quicker without compromising science, public health, or the environment.

Allow the use of presumptive remedies: In specific circumstances, the Department should allow the use of presumptive remedies for a site remediation in order to move into remediation quicker. In most cases, if not all, you need not know where every molecule of contaminant is prior to selecting a remedy. Once the remedy is implemented, an assessment may be made and any remaining contamination can be dealt with.

Establish time frames for NJDEP review: When a submittal -- and we've heard how time frames are going to be imposed on the remediating party. Maybe we ought to look in the mirror. When a submittal is made to the NJDEP, it is nearly impossible to predict when a decision will be forthcoming. It is not unusual to have submissions sit for six months or more before they're even reviewed for the first time. By utilizing LSPs and external professionals, the Department should be legislatively mandated to meet specified review times for the various required submissions. Delays are significant disincentives to anyone who wishes to remediate a site voluntarily.

There are many other issues that I could discuss, but time does not permit. I do want to make sure that we do not denigrate the use of engineering controls. Capping is a legitimate remedy for certain sites under certain circumstances. To call them -- to say *pave and wave*, to me, is an epitaph and does a disservice to people who have to deal with those sites on a daily basis.

However, one thing is certain--

ASSEMBLYMAN McKEON: You've got to wrap it up, please.

DR. BERKOWITZ: And I will.

The Commissioner and the Legislature has made significant efforts to improve upon the process. We appreciate that and we applaud them. We appreciate the presence of Irene Kropp as being a stakeholder in the process. I very much appreciate the opportunity to have provided input, not just now but throughout the course of the year.

Thank you.

And I would like to answer Senator Smith, if I could.

ASSEMBLYMAN McKEON: Just please, if you could take a moment.

DR. BERKOWITZ: Senator Smith, I don't see the rampant dishonesty of consultants that you may perceive.

SENATOR SMITH: No, no, no, the reverse.

DR. BERKOWITZ: Just hear me out.

SENATOR SMITH: I did not say there was any dishonesty on the part of consultants. I said you have an economic pressure when the applicant doesn't pay their costs.

DR. BERKOWITZ: Right.

SENATOR SMITH: And if you allow the relationship to be direct, the employee-employer relationship is the wrong one. The licensed site professionals, if we go that way, should be an employee of the State government, not the employee of the applicant.

DR. BERKOWITZ: I'd like to make two comments. First of all, 100 percent of my practice is in the State of New Jersey. It involves my ability to work with government, and it involves my honesty and professionalism. Because every time I come in the door it's a new day for me.

There is a significant disincentive for me to do anything but what's required. And that's all I would like to say.

ASSEMBLYMAN McKEON: Okay. Thank you, all.

Seeing no further questions, and in consulting with Senator Smith, I just want to remind everybody we've now been at this close to three hours. We had our colleagues plan their busy days knowing that we would be concluded at about 1:00.

Now, Senator Smith and I are committed to continue this at least for the next 45 minutes or so. But in order to get everybody heard, we're going to limit you to five minutes. I'm going to reiterate this request: If you have written testimony, please submit it. We're all very capable and will, indeed, during this long process in front of us, consider it. I know it can sometimes be intimidating to be before this group, although I can tell you we don't take ourselves all that seriously. (laughter) If you have to read, you shouldn't be up here at all. Just submit it. Please summarize, with all the incredible expertise you have coming up here, what it is you'd like to say. We can move more efficiently.

And with that pressure--

SENATOR SMITH: John Maxwell, New Jersey Petroleum Council.

J O H N M A X W E L L: Thank you, Chairmen, for the opportunity to be here.

I have a couple comments to make right off the top. First of all, the Massachusetts Licensed Site Professional Program was signed into law by Theodore (*sic*) Weld, back in 1993, 1994. If Jeff is in the room, I just wanted to -- couldn't miss that opportunity.

And the Site Remediation Program has been addressed over a number of years by the Site Remediation Industry Network. That was founded back in 1993 by two prominent members of, one, the Petroleum Council, and another from the Chemistry Council.

We were involved in trying to reform the Site Remediation Program since way back then. And we've been in constant contact, or periodic contact, at least, with the agency. And we've been making some progress, and we see before us today an opportunity to go a little farther.

In spite of Chairman McKeon's remarks just a little bit ago, I just have a couple things I want to read, and I will be real quick.

ASSEMBLYMAN McKEON: I'll just have lunch. Don't worry. (laughter)

MR. MAXWELL: Okay.

We recognize the hard work and struggles the Department has had in implementing the Site Remediation Program. And the difficulties in the Program's performance are not for lack of talented or devoted staff. It's a result of an approach to site remediation that is prescriptive, inflexible, and assumes the worst case in all sites. If we want to have an effective program, we need to make changes to this approach.

The poor performance is not due to low staff levels, as most well-performing states have higher case loads per staff than New Jersey. In the Site Remediation Industry Network, which is comprised of people who do site remediations not only in New Jersey but throughout the United States, and in cases throughout the world, we brought a lot of expertise into the program.

There's one individual in SRIN that has responsibilities outside of the United States, throughout the world. And they meet the one-in-a-million criteria when they're doing cleanups in Southeast Asia, and in Africa, and so on, and so forth. He's assigned to the world. And he has one other assignment, and that's New Jersey. And that's because the Program is so convoluted and so difficult to get through. That sends a message.

Anyhow, the poor performance is due to a worst-case scenario that I have just mentioned. High-priority sites are not given more attention, allowing them to become issues, as we have seen in the press. Low-risk sites are even given the same level of effort, drawing resources away from higher priorities. Low-priority sites cannot be closed, as the requirements to reach closure are impossible to meet, as we heard before. Chasing the last molecule out of the aquifer is virtually impossible.

Without an ability to realistically prioritize sites and close low-level sites, the system has become jammed and ineffective. The Department does not need more resources to do a better job, it needs a system that allows it to prioritize sites and close low-risk sites in a timely manner. The current tech regs could work if available tools were used more effectively. For example, variances could be used to close low-risk sites.

And in conclusion, guidance should be issued in a manner similar to the previously released site remediation news. Guidance could be developed working together with stakeholders in a UST remediation task force.

In closing then, I say that the New Jersey Petroleum Council fully supports the statements that Tony Russo made. We fully support the

comments that our friend Jorge Berkowitz made on behalf of the Chamber and the BIA.

And finally, I couldn't help but use some kind of alliteration here. And I was thinking, this is one small step for the DEP, yet it could be one giant leap for the perception that New Jersey is a clean state open for business.

Thank you very much.

ASSEMBLYMAN McKEON: And that's your sound bite, Amos.

MR. MAXWELL: I was thinking Neil Armstrong, first golf swing on the moon.

SENATOR SMITH: Next is Bill Wolfe, from New Jersey PEER.

**BILL WOLFE:** I want to bring up a chart we didn't see today. We didn't hear any discussion around this issue. It's very important -- underlying source of the problem.

My name is Bill Wolfe. I'm Director of New Jersey Public Employees for Environmental Responsibility. We're a national support group for the professionals that work in the Federal and State agencies. I'm a former DEP employee. I joined DEP in 1985, when Jorge Berkowitz was directing the Site Remediation Program, and I was a planner by training at the time, and got in his staff's hair quite a bit in terms of trying to rationalize his program. And I agree with his remarks with respect to the need for a strong, technically astute, and competent staff at the Department, and remedial program. And that's what I'm trying to promote.

I had prepared three-- My written testimony focuses on three issues. I was asked to focus on the licensed site professional program and remedy selection, being the two most important. But I'd like to, instead, make a few clarifications, in terms of some remarks I heard.

DEP said some things that were very important, but it didn't get any attention. There are thousands of no further action letters out there that are partial -- either portions of a site, or soil and not groundwater -- that are being used to manipulate and mislead investors, local government officials, construction code officials with respect to the actual conditions at a site. And it's highly significant that those prior, no further action approvals be reexamined in light of the current conditions. So that's a very important sleeper thing that was mentioned that you might want to look at.

With respect to Senator Gordon's question -- too bad he's not here. I'd like to clarify that the current law already provides a mechanism to "chase the last molecule" out of an aquifer, the way it's been characterized here. There are site-specific means in the current law to reclassify groundwater that's not potable. And that mechanism has not been used because the regulated community cannot make a scientifically valid demonstration that, in fact, the aquifer should be reclassified.

Getting to my testimony, the Department's perception of the Massachusetts program-- I have written testimony, actual audits of that program. I'd like to see their written data with respect to the number of sites that have passed an audit. Because the data I have here are completely inconsistent. And the sites that actually pass an audit -- whether it's a random or what they call a *Class 3 focused audit* -- are in the range of 9 to 36 percent of sites that are actually -- that are audited that are okay.

Obviously, we oppose the licensed site professional program. But if, in fact, you're going to go down that road, we agree with Senator Smith's concern that those folks have to be paid for by the State. They're basically serving the public interest, not a responsible party's interest.

With respect to remedy selection: The law, prior to 1993, vested the DEP with remedy selection power. And that law was amended in '93, so it's not something that we don't know how to do. The law was changed with a specific public policy purpose in mind, and it was to, at that time, reduce the DEP's oversight and track private investment. So what I would argue is, the move for flexibility that the regulated community seems to be pushing is actually the barrier to investment, because lack of flexibility obviously reduces predictability and certainty.

And this goes to the question in the chart here. The give and take, and tug of war that happens between the consultant community and the DEP staff is a function of the lack of the DEP's effective authority to compel a bottom line. So a protracted and endless debate occurs because the DEP doesn't see the program-- They see the program as a partnership, as cooperative, as flexible. They don't drop the hammer. And that keeps the clock running, and the consultants get paid, and decisions are not reached.

So what got implemented in a very curious way that you guys may not have been briefed on fully is: The last Commissioner took what was known as the voluntary clean-up program, that had been developed over time, and he took the grace period law and he put two, what I perceive as, negatives-- Because the voluntary clean-up program was to allow a responsible party to proceed at their own pace, as they saw appropriate, not

based on risk or environmental threat, but based on market criteria. And the grace period law was a statute enabled -- developed under the Whitman administration to give flexibility for minor violations, which were paperwork in nature, that presented no environmental risk.

Well, the grace period law and the voluntary clean-up program came together, and they've now been the source of a program to issue automatic -- or notices of violation for technically deficient work plans and remedial work activities. And there you see some of the data. And that will give you some indication of the quality of the work that's coming into DEP. And that is one of the underlying problems -- that you're getting technically inferior work products submitted to the Department. It's not necessarily that the Department is being harsh, or restrictive, or inflexible. It's that the work product coming in the door is deficient. And the fact that the cleanups get delayed is because the Department can never cause a finality to a deficient application.

So that is a big part of the problem. And I've got data in my exhibits that will use DEP data that showed zero enforcement. So this is an improvement on the status quo. So I want to make the case for command and control -- improves the pace, reduces the cost, and stimulates investment, and allays public concern that the public interest is not being protected because the watchdog is sleeping.

So I'm going to turn the reality -- the regulated community's reality on its head and argue very strenuously. When you have a process that shuts the public out, that puts the consultants for the responsible party community in charge, that weakens the DEP's hand and they have weak enforcement. All of those things undermine the technical integrity and

credibility of the program. Plus, you have over-the-transom political intervention through Assemblyman Rooney's concerns about the consultant that gets hired; or a case I'm dealing with in Clifton right now, where legislators directly intervene and pressure the Department to jump when a site isn't prioritized for a low-priority site -- for what the DEP described as a transactional case. All those factors come together and the public has no trust and confidence.

Investors lack -- have -- are smart. They realize the same thing. They're like, "If the program is running down hill, and there's all these kinds of deals being cut, and we're capping things that need to be remediated, there are skeletons in the closet. I better be careful." So risk and certainty are reduced. And certainty is enhanced, and the investment climate actually gets better if you have a stronger program with greater technical integrity, and more command and control authority by the DEP.

And I have written documents you might want to look at. They're all-- I strongly encourage you to look at the documents. They're all DEP documents. There are things you haven't heard from the DEP, including their approach to prioritizing sites. You know, they just said there are 14,000 sites they're willing to put into this program. I don't buy it. They're throwing up a smoke screen that they've got too many cases. The private sector, in Management 101, says if you have scarce resources and a large problem, set some priorities. The statute mandates that priorities be established.

The Commissioner was here in October saying that was her first priority -- to develop priorities. And now that initiative has fallen off the table completely. Why is that? Until we get some data from DEP that lays

out priorities and diagnoses the cause of the underlying problems with respect to delay and lack of cleanup, you shouldn't move on any legislative front, frankly, until you have a more honest briefing from the Department.

Thank you.

SENATOR SMITH: Question for you before you leave.

MR. WOLFE: Sure.

SENATOR SMITH: It's a two-part question. Number one, do you agree with the Department's suggestion that the areas where they would be able to open up the remediation, go beyond the one-in-a-million standards, would be based on the ultimate use, schools, day care, and one other use -- or do you think that the opening up of the remediation choice should go beyond the ultimate use? And if you do believe that, what's the criteria that you use if you go beyond the use?

MR. WOLFE: I disagree with the Department. If the Department meant to say that that's the sole criteria -- that the land use is the sole criteria under which they would have authority to mandate a permanent remedy, that is, I think, the wrongheaded approach. I disagree with that. I don't think that's what they meant to say. I think the statute provides the adequate criteria right now, which are risk-based. And they should be ecological risk, as well.

So I think some of the testimony we heard earlier is saying that some sites that need to be cleaned up, that are high-risk to the environment or adjacent communities, aren't being cleaned up because there isn't a developer ready to come in and make the commitment -- the financial commitment -- to make it happen.

So I think the criteria need to be based on both the -- what Lisa Jackson called *sensitive receptors*, meaning children, schools, housing, and an environmental risk criteria. And I think that those criteria, frankly, should be very narrow, and they should -- and I believe-- Again, I think you're getting a mischaracterization. Because no environmental person that I'm aware of is advocating that 100 percent of the sites be permanent remedies. That's totally a mischaracterization of our position. Our position is that there should be presumptive bans on, say, putting housing on a landfill, unless you can demonstrate that it's okay. Do you see what I mean? So that demonstration -- that hurdle should be much higher, and it should be, presumptively, you can't do it. And then there need to be additional environmental criteria to say, if your site is impacting sensitive wetlands, or river systems, or environmental features, in addition to drinking water and vapor intrusion, then you have to go that extra hurdle to demonstrate to the Department, or the Department would have the authority to say, "Permanent remedy, dig it up, take it out."

And with respect to the last molecule, I think you're getting very misleading testimony on that -- this notion that we're cleaning up groundwater. The data I submitted to you shows that more than 90 percent of the known groundwater contamination cases are not active pump-and-treat systems where they're actually treating the groundwater and cleaning it up. There are what are called *passive remedies* that allow the pollutants to dilute, dissipate over time, or naturally attenuate. So we're not cleaning up groundwater in New Jersey, and we're not spending a lot of money on it. And I think the regulated community is giving us some-- And again, go back to the Department and ask them very pointed fact questions

on -- of the more than 6,000 known contaminated groundwater sites, how many are actually doing active pump-and-treat systems? And the data I gave you shows that about 10 percent are.

ASSEMBLYMAN McKEON: Thank you very much.

Ted Schwartz, from Scarinci & Hollenbeck.

**T H E O D O R E   A .   S C H W A R T Z ,   E S Q . :** Good afternoon, respective Chairmen and members of the Committee.

As you indicated, I'm a member of the law firm of Scarinci & Hollenbeck, and I've been practicing environmental law for 42 years in New Jersey. And I have been devoting much of my efforts to brownfield redevelopment for industrial and commercial purposes.

I'll be as fast as I can, John. I've tried to cut this down as much as I could.

The most significant economic engine in our state exists at Port Newark-Elizabeth, and soon Jersey City. The port is the second largest one in the United States, Los Angeles being the largest. If you've been watching National Geographic the last few weeks, you could see a good program on America's ports, which describes how important the ports are to our economy.

The Port of Newark-Elizabeth serves a region of 27 million consumers from New Jersey, New York, Connecticut, Pennsylvania, Maryland, and Delaware. It's the leading economic gateway in this part of the country, due to the confluence of rail, road, airports, and population.

Recently, as you're probably aware, the State of New Jersey and the Federal government have spent hundreds of millions of dollars for dredging projects in the New York Harbor area. The purpose of these

projects is to deepen the channels so that new, larger ships can come in and bring additional cargo. I attended a recent press conference with Governor Corzine and Chairman Coscia on March 20 which dealt with the vitality of the port.

The Governor had the following to say: “Even during times of economic uncertainty, the Port has been a lifeline for this region, providing a continuous source of jobs and economic activity. For that reason, we must protect this critical asset and move forward with a clear vision for the future, one that will allow the Port to maintain its world-class reputation. Our vision includes targeted investments at existing port terminals that will allow it to handle projected future growth in expanding our port facilities beyond their existing boundaries to allow us to officially handle more cargo.”

Chairman Coscia echoed similar comments.

The Port has competition from the ports in Norfolk, Charleston, and Savannah, which ports are now growing due to the inability of Port Newark-Elizabeth to handle the cargo that’s presently coming in and the additional cargo to come in. To serve these needs and continue to grow the Port, distribution centers are needed in proximity to the Port: urban centers, such as Newark, Elizabeth, Jersey City, Carteret, Woodbridge, etc.

The predominant land available in these areas are brownfield. To identify candidate sites, the EDA and the Port Authority launched it’s Portfields Initiative project, which identified 16 or so sites for consideration as warehouses and distribution centers in a defined area within the port

districts. All of these sites require extensive environmental remediation as part of their development.

With this economic backdrop, the development of brownfield sites are critical to this economic engine -- employment opportunities at urban centers, new ratables in place of abandoned relics of the past, opportunity to improve the environment, and consistent with the State Smart Growth plan.

Without the ability to meet the needs of managing the increase in cargo, we are beginning to lose commerce to other ports and not capitalizing on our investments and infrastructure improvements, such as dredging, improved rail service, and the Liberty Corridor transportation projects.

What is the problem? The lack of shovel-ready sites for warehouse distribution centers; the inability to establish occupancy dates for perspective tenants. And presently, in the I-78/81 corridor and in other ports, they are better positioned to deliver distribution warehouse facilities than we are in New Jersey. The cost of remediation, combined with other site development requirements, drive costs above market acceptability.

Remediation comments: Brownfield remediation should be treated as a separate regulatory entity. The DEP brownfield program was a step in the right direction. Technical regulations are not suited or conducive to brownfield redevelopment and cause time-consuming review of projects. As such, projects become bogged down in unnecessary delineation requirements. With a limited staff at DEP, this causes inevitable backlogs with an overworked staff. Tech regs should be tailored to be more reasonable in brownfield applications and provide flexibility

based on site-specific conditions -- assign most capable DEP staff to complex brownfield sites. Each project should be identified early on as to its environmental components to provide a coordinated approach to complete project review and approval. This is mostly directed at the land-use program in DEP, which we have to merge together with the site remediation folks. A mechanism has to be established to assist in DEP project reviews, especially with the budget cuts that are now being proposed.

In short, the brownfield program is overloaded with burdensome regulations and requirements which have added countless additional time and costs, both at the development stage and the review stage. Without developing mechanisms to streamline the brownfield program and make adjustments to regulatory requirements to considerably reduce the time and expense for project review and development, unfortunately New Jersey will not be in a position to compete effectively in the marketplace.

As noted before, a massive investment in infrastructure improvements will not produce the anticipated economic results, and we may not be able to even sustain our present position. The economic incentives available for brownfield remediation projects for the development of warehouses and distribution centers are almost nonexistent. The only program that affords reasonable incentives is that which is carried out under the brownfield reimbursement program, which is strictly for businesses that are engaged in collecting sales tax, such as retail establishments.

Some may argue that treating Brownfield differently as to remediation requirements is not a good idea, for it penalizes urban centers

from environmental justice perspectives, as commented by the people from Camden. However--

Excuse me. I'm really cutting this down.

ASSEMBLYMAN McKEON: I appreciate that.

MR. SCHWARTZ: Unfortunately, if incentives are not provided to develop brownfield sites with reasonable remediation requirements, they will only remain as relics with continued contamination existing on property with little or no hope of productive development. This is not a good course either, and there must be a happy medium. The creation of distribution centers would produce thousands of jobs, as noted by the Governor and Port Authority Chairman. These jobs will help the economic vitality of urban centers, which would create self-esteem and a better quality of life for the residents.

I want to leave you with one last point. I'm a firm believer in contract remediation, which nobody has talked about, and was not even discussed in any of the white papers from the stakeholders' committees. I would suggest that, in legislation, there be authority given for formal agreements to be entered into between the developer and the DEP. It's really an expansion of the existing memorandums of agreement which contain NJDEP performance requirements, as stated by Mr. Berkowitz, which I think are very important. The DEP would have to agree on the scope of the project and permits necessary, establish timelines for deliverables for each party, establish timelines for project review and completion. Frankly, it's decision time, and we cannot be left at the station, so they say. The stakes are very high.

Thank you very much.

ASSEMBLYMAN McKEON: Thank you very much. We appreciate you being here today, as well as the depth of your experience.

Mike PISAURO, NJEL.

**MICHAEL L. PISAURO JR., ESQ.:** Thank you very much.

My name is Mike PISAURO. I represent the New Jersey Environmental Lobby.

I'd like to thank the Committees for holding this hearing.

I've submitted testimony, so I'm going to try not to repeat it. There are a couple of things I--

ASSEMBLYMAN McKEON: Thank you for that, Mike.

MR. PISAURO: I said I would try. (laughter)

And just as a lawyer says, "Just one last word," it's never one last word.

A couple things: We need to amend our statutes. You've heard some of it. N.J.S.A. 58:10B-12(d)(2) indicates you cannot take a look at cumulative impacts. We have to. What we know of chemicals is miniscule to what their impacts are. The more we learn, the more we learn we don't know what we know.

The 2006 GAO reports indicates that even though EPA has the authority to review and test for human health and the environment chemicals, they're not doing that. They don't have the resources or the authority to do it. And the report further said, "EPA does not routinely assess the human health and environmental risks of existing chemicals." So we know there are chemicals out there that we don't know what they're doing. We know these chemicals are getting into our water, getting into our grounds, and they're interacting. So handcuffing DEP from looking at the

cumulative impacts is not being protective of the human health and the environment, which is a requirement of the statute.

Also, the standards that are in place are set for a healthy adult male, not for our most at-risk children. So when you're remediating and doing a cap -- cap and wave as some have said and some have objected to -- you're not protecting those most at risk, and we must do that.

You've heard, from Jeff, recent data from the Massachusetts DEP program. On Level 3 audits, 21 out of 30 have failed. That's not a success. That's not a program we should model. You've heard from DEP today that 80 percent of institutional controls have failed. Again, something is terribly broken. And before we continue to use institutional controls, we must look at it and decide, really, should we do a permanent remedy or go forward? The statute prefers permanent remedies. Land uses change. As you've heard from DEP, and as the EPA, the Governmental Accounting Office, and the Environmental Law Institute have all studied, people do not read, understand, or comprehend institutional controls, and they forget about them. So what might work today is not going to work 15 years from now or 20 years from now.

Capping and putting institutional controls -- those are temporary. They fail. And the reports indicate that some of these -- they're never put in place, they're not put in place properly, they're not maintained, and they're not repaired and replaced. Take a look at the Honeywell case that came out of the district court in 2003 and 2005. There was a repeat of 20 years of instances where the solution that was put in place wasn't really a solution, because it wasn't going to work in the first place. It failed, it cracked, it broke, it leaked. The responsible party did not

fix this in a timely manner. It had to wait until DEP discovered the issue. God knows how long it took before it was learned. And then the DEP had to force Honeywell to do the fixes. Well, if that is what business as usual is, we're not protecting human health and environments, and we must do that.

Also, licensed professionals do not seem to be working. If we're going to go down that route, I cannot echo strongly enough, Senator, your comments, as well as others. The responsible parties cannot have the strength of the pocketbook over these licensed professionals.

I've submitted testimony, as I've indicated. And we're relying on that. I look forward to working with the Committee as this goes forward, putting in place a program that we can come back to being the jewel that we were of the country, where we had a program that was admired and copied. And I think we can do that if we go forward.

Thank you very much.

ASSEMBLYMAN McKEON: Thank you, Mike. Excellent work.

SENATOR SMITH: Our next witness is Steven T. Senior, from TRAC, Technical Regulations Advisory Coalition.

Mr. Senior.

**STEVEN T. SENIOR, ESQ.:** Good afternoon.

I'm an environmental attorney with the law firm Riker, Danzig; and also a Co-Chairperson of an organization called the Technical Regulations Advisory Coalition, TRAC.

I have written testimony, and I will primarily rely upon that. But I want to make one point that echoes something Jorge Berkowitz said about what we call the *tech regs*. The tech regs are hundreds of pages of

technical requirements and regulations that govern the process by which we investigate and remediate sites in New Jersey.

This process is highly prescriptive. It does not include sufficient flexibility to take into account the different site-specific factors and circumstances you see at contaminated sites and brownfields. And I think that any process by which we try to reform site remediation, whether you use LSPs or consultants to the DEP, or other methods, will not achieve the goals that you're looking to achieve -- timelier cleanups, better cleanups -- unless we also address this process. It's too prescriptive. It doesn't allow DEP case managers or outside consultants to exercise best professional judgement and make decisions about how to investigate and remediate sites based on best professional judgement. I think we need to allow these professionals to do what they're trained to do and make good decisions about investigating and remediating sites, rather than following a cookbook that would apply to every site.

SENATOR SMITH: Mr. Senior, I have a question for you.

We live in a state that is rightfully paranoid about its government. How do you say to the DEP, "You have the flexibility to do whatever you think is fine," without there being charges at some point that the lower standard for Site A is the result of some political pressure? How do you deal with that paranoia? How do you-- I don't think you could just put in a statute, "Be flexible."

Can your organization provide criteria -- specific objective criteria that say, "In the event a site has *XYZ, ABC* characteristics, then the following can occur or cannot occur"? But to just simply say we're going to

throw the word *flexibility* in here doesn't do the trick. We're all going to be criticized for that, and the DEP is ultimately going to be criticized for that.

What specific objective criteria can you use that would allow "flexibility"?

MR. SENIOR: Well, I'm not sure that you can develop specific objective criteria that, in the first instance, you're going to apply to every site, and I think that's part of the problem. Site remediation is complex. These sites are all different.

SENATOR SMITH: Yes, but you're allowing the site -- the managers of these cases to be subject to enormous criticism because they treated two sites, that appear maybe on the surface to be the same, to be treated differently.

See, that's the problem with your concept. You've got to give us some specifics so the world knows when "there's the ability to use tech regs bulletin number two instead of tech regs bulletin number one."

MR. SENIOR: There are some specifics in the statute right now, for example, the 10-to-the-minus-6 risk -- health-based risk standard. Other states, for example use a different risk: 10-to-the-minus-4, 210-to-the-minus-6, and this is a range that the EPA uses as well. It's an objective criteria.

SENATOR SMITH: What does California use?

MR. SENIOR: I don't know what California uses.

SENATOR SMITH: They're always ahead of us.

MR. WOLFE: (speaking from audience) Ten to the negative five.

MR. SENIOR: Ten-to-the-minus-five.

SENATOR SMITH: So you're saying New Jersey has the most restrictive standard in America?

MR. SENIOR: It's the most restrictive that I'm aware of.

MR. WOLFE: (speaking from audience) EPA risk range goes 10-to-the-minus-4 to 10-to-the-minus-7.

SENATOR SMITH: I'm sorry, that was Mr. Wolfe. For the record, that was Mr. Wolfe in the background saying that the EPA standard is 10-to-the-minus-4 to 10-to-the-minus-7. Ten-to-the-minus-7 would be one-tenth more restrictive than NJDEP if we have that across-the-board standard of 10-to-the-minus-6.

But it gets back to the same problem. You're going to set people up for a terrific criticism that they're treating people unfairly. You'll have one company saying, "But you did this for the XYZ corporation, and you didn't do it for me."

So if you can't come in with some specifics, you can't ask us to just throw the word *flexibility* in there. It's not going to work.

MR. SENIOR: I don't think that's what we're asking. Other states are doing this differently. They're not including very prescriptive regulations, but they're using this information as guidance that doesn't have to be applied at every site.

SENATOR SMITH: Send us your suggestions in writing. I'd like to see some language of what you're trying to propose. I'm sure the DEP case managers-- If, in fact, you're saying everybody gets treated with the same cookie cutter, and there's a need on "simple" sites, or not very contaminated sites, to use a different set of checklists -- give us a criteria that we could at least look at. Because right now, you're not doing that.

You're just simply saying, "Give the case manager flexibility." And that is just going to lead everybody to a scandal, or to criticism, or whatever.

MR. SENIOR: We'll provide some proposals.

Thank you.

SENATOR SMITH: Okay.

I'm sorry. I didn't mean to chase you out of the chair.

(laughter)

Our next witness is Adam Liebttag, from CWA.

Mr. Liebttag.

**A D A M L I E B T A G:** I'm here representing CWA Local 1034, which is the labor union that actually represents the rank and file scientists, geologists, case managers, and supervisors in the Site Remediation Program.

I want to thank the Committee Chairs and the members of both Committees for getting together today and affording us this extra time to weigh in on the subject.

The Union stands fully ready to participate in a deliberative dialogue. We are concerned about partial remedies taking place possibly over the Summer, and then a second round of remedies or a second round of reforms taking place later in the year.

I will restrict my comments today, though, to the issues of staffing shortage at the Department and on the licensed site professional program, which we do consider to be a form of privatization.

On the staffing shortages: You have the information, you have the charts and the graphs, you have the DEP white papers. I will not go through those numbers again in detail. However, I also do not want to give them short shrift. It's easy to say, "There's a staffing shortage, the problem

is too large, there's too much work. We can't possibly give the staff -- or give the Site Remediation Program enough resources to catch up."

I think it's important to look back, just very briefly. The DEP white papers go back over five and over nine years. If we went back further than that -- and I think that Jeff Tittel referenced this in his testimony -- you would actually see a very sharp reduction in the number of staff due to multiple reductions enforced during the Whitman administration in the mid- and late '90s. So we really have not fully recovered from that, not only in Site Remediation, but in other programs within DEP as well.

The staffing numbers clearly have been on the decline. They've been held almost flat over nine years. There's been no commensurate growth in staff and resources to match the growth in the number of sites, the complexity of the sites, and the increasing frustration -- legitimately so -- from the residents and from businesses in New Jersey that want a faster response. But quite simply, the staff at SRP are taking on more water faster than they can bail it out. And I think that we all appreciate that point.

There's a simple, but perhaps politically unpopular solution, which is provide more resources and more staff to the Department. During the stakeholder process over the Summer, I believe that it was nearly unanimous around the table -- including the contracting community, the engineering community, and the responsible party community -- to provide more resources and more staff to the Site Remediation Program, because it ultimately will make the Program function much better.

The DEP has provided an estimate of a thousand positions to clear every -- to respond to every submission within 60 days. We do not necessarily agree with that analysis. We also don't agree that 60 days is a

one-size-fits-all response time frame. There are different types of sites and different types of submissions, and they should have their own sorts of criteria and deadlines.

My Local, Local 1034, and the CWA in general has encountered this during this administration in another agency -- this kind of problem. And it occurred with DYFS, it occurred with the Department of Children and Families, where there were crisis points that were reached. There was a lot of public scrutiny, a lot of criticism. And there was an investment. There was a recognition that when the system is broken, you have to dig in and try to fix it. And with the Department of Children and Families -- which was also a public health issue -- we worked with the administration to increase staff, to reprioritize how the work was done, put institutional controls in place, and cap caseloads. And we are looking to try to have that kind of a dialogue take place here when it comes to site remediation reform, merely than saying -- simply saying, "We don't have enough staff. We can't fix the problem."

In my testimony, which was submitted in written form for your review as well, there are a list of solutions that we are providing. I want to go through them just very briefly, mostly as bullet points.

The first is that there's currently a hiring freeze, statewide, which is affecting the Site Remediation Program and every program in DEP. That statewide hiring freeze prevents the Site Remediation Program from staffing up to what it should or could do. And that statewide hiring freeze also limits the ability to hire new positions that are on dedicated funding lines. So if there is dedicated funding -- if there's entirely a fee or a self-

funded position, they still cannot hire. And that doesn't seem to make a lot of sense to us.

The second issue is with respect to overtime. The overtime rules are complicated from the Department of Personnel. So when we have geologists with a backlog that would be very glad and very happy to attack that backlog, the Department's hands are somewhat tied in how they can structure that overtime work.

Speaking of geologists, with targeted hiring of new positions, a lot of the backlog -- at least internally within the Site Remediation Program and what they've articulated as a problem -- comes from the technical support staff, the geologists and the scientists that provide technical support and site reviews to the case manager. There are far too few of those technical support staff people. So when we're talking about staffing up with some very targeted hiring -- we're not talking about hundreds, we're talking about targeted hiring -- of geologists and technical support scientists, we feel that we could help reduce that backlog and give faster response times to the case managers.

We also want to see increased revenue, increased fees. If the cost of working on a site doesn't match what the Department is collecting, then that's a problem. And so we need to have fees that are responsible and commensurate with the complexity and the submission of the site.

We were very disturbed today -- I was very disturbed to hear the testimony from the Department that the universe of cases that could go into the licensed site professional program is around 14,000. That number is higher than what has been discussed in the past. And essentially, we would see that as giving up. My members in the Department are not giving

up. They do not want to see 14,000 sites handed off to contractors who are on the payroll of responsible parties. We have a very deep, deep concern, and we oppose the licensed site professional program as it's been conceptually proposed today.

The bottom line is: If it sounds too good to be true, it probably is. And the licensed site professional program being a zero taxpayer impact means that someone has to pay those contractors. They would be on the payroll of the responsible party. And we are deeply concerned about pay to play concerns, we are deeply concerned about the quality of submissions that are already coming into the Department. And as others have testified, if you get bad product in, that will delay things. And that has caused my members to do duplicative work. They have to essentially rewrite the submission that the contractor provided, which is like doing the work twice.

I'm not saying that every engineer or every contractor is a bad actor, but if you're only auditing 20 percent of the sites, that means 80 percent of the sites you don't clearly -- and have a guarantee as to what happened there.

So we should not be privatizing. Licensed site professionals -- the program is privatization. You're taking the regulatory -- and in some cases the statutory -- authority of the DEP and giving it to a private-sector entity. That is outsourcing regulatory authority. And we believe that it's bad public policy. We also believe it's outsourcing, and it's privatization, which is clearly a labor issue for my folks that work in the Department every day and don't want to see that happen.

The rest of it is in my testimony. I thank you for your time. And we stand ready to work with you going forward.

SENATOR SMITH: Adam, one question for you.

MR. LIEBTAG: Yes, sir.

SENATOR SMITH: Do you agree with the comment that was made before that OPRA is crippling the Department?

MR. LIEBTAG: Absolutely.

SENATOR SMITH: How would you feel about outsourcing that? (laughter)

MR. LIEBTAG: I don't--

SENATOR SMITH: And here is what I'm talking about. We would get an immediate increase of 25 percent of the professionals' time in DEP if you said, "Listen, we want to -- we'll even provide you with space in the DEP building. Put your copiers in here." Somebody -- a lawyer or engineer needs the file, the background on a case. There's somebody there who is not a State employee, an employee of the XYZ -- whoever got the bid -- corporation. And maybe you have to have a DEP person supervising to make sure that things are done properly. They get guidelines on what has to be redacted. And then you have that particular function outsourced from State government, and we now free up people 25 percent that are not freed up now because we're getting killed with these OPRA requests.

You know, I don't want to put you on the spot. That's a tough thing.

MR. LIEBTAG: No, I actually-- Let me answer that.

The Department has clearly suffered the brunt of OPRA requests.

SENATOR SMITH: We're doing other people's work, quite frankly.

MR. LIEBTAG: And what they've done, I think-- We don't need to have privatization of the OPRA function. The Department has responded, over the last couple of years, by creating -- what I give them credit for -- a streamlined OPRA office, a streamlined approach within the Site Remediation Program. And they've dedicated entire staff lines, entire FTEs to dealing with OPRA.

SENATOR SMITH: Do you have any idea how many?

MR. LIEBTAG: I don't have that information.

SENATOR SMITH: Is the Department here? (affirmative response)

How many people are dedicated to OPRA requests for the Site Remediation Program?

ASSISTANT COMMISSIONER KROPP: For the Site Remediation--

SENATOR SMITH: This is Irene-- For the record, this is our DEP Assistant Commissioner Irene Kropp.

ASSISTANT COMMISSIONER KROPP: Thanks.

For the Site Remediation Program, there's a split between the number of staff that are permanent staff and the number of temps that we have in the Department. I'd say we probably have around eight or so staff.

SENATOR SMITH: Eight people full-time -- pardon me, full- and part-time.

ASSISTANT COMMISSIONER KROPP: And then there are temps. We probably have around five or six temps.

SENATOR SMITH: On top of the eight?

ASSISTANT COMMISSIONER KROPP: Right.

SENATOR SMITH: And this is just for the Site Remediation Program?

ASSISTANT COMMISSIONER KROPP: Right. Although, just--

Yes, it is. But let me just also clarify that OPRA was folded into the Site Remediation Program. So that entire function for the Department is under my purview at this particular point in time. But I'm speaking strictly for Site Remediation.

SENATOR SMITH: Right.

ASSISTANT COMMISSIONER KROPP: And then there's probably another five or six in the OPRA office that was the original Department OPRA office. And then in every single field office and in every single program there are people that receive their requests, review to see if there are actual documents related to the request, gather the files, make appointments with people. So there are staff who spend anywhere from 20, to 40, to 60 percent of their time on a daily basis dealing with OPRA requests scattered throughout the entire agency.

SENATOR SMITH: Do we collect for that?

ASSISTANT COMMISSIONER KROPP: No, we do not collect. We were able, at one point in time, to get copy costs reimbursed to a certain degree, but that's was just lowered also, recently, statutorily.

SENATOR SMITH: Not staff costs?

ASSISTANT COMMISSIONER KROPP: No, no staff costs or copy costs.

SENATOR SMITH: How would you feel about outsourcing the OPRA function?

ASSISTANT COMMISSIONER KROPP: I feel uncomfortable without doing more of an evaluation in answering the question.

SENATOR SMITH: All right. Well, we're just throwing it out for people to think about.

Thank you, both.

Adam, thank you.

MR. LIEBTAG: And we represent those folks who are working on the OPRA function. So I think we'd be concerned about outsourcing those as well. But I appreciate the point.

SENATOR SMITH: Okay. Thank you very much.

MR. LIEBTAG: Thank you.

SENATOR SMITH: Eric DeGesero, from the Fuel Merchants Association.

**ERIC DeGESERO:** Thank you, Chairmen.

Eric DeGesero, Fuel Merchants Association of New Jersey.

I'd like to thank both of these Committees and Assistant Commissioner Kropp for going through this process.

I think the one thing that the Assistant Commissioner has worked on doing -- we've spent a lot of time talking about standards today. But as much of this is pertinent to culture and to management-related issues -- in looking to get caseworkers to talk to responsible parties instead of everything simply being done by letters back and forth, and letters of deficiency -- and actually trying to make the responsible party work with the Department is an essential ingredient to making this program work. And I think she is very correctly working on engaging dialogue between both sides.

The one thing Senator Gordon raised before -- for all of the effort and all of the work that has been done and will be done, the issue of groundwater is not on the table as part of this process; and that there are still significant remedial issues that the State will confront, in terms of delays and getting sites ultimately back to productive use. The Senator mentioned groundwater classification, not an issue that's been discussed -- I don't think one that is going to be discussed, but certainly an issue.

Relative to licensed site professionals, we certainly support the concept. But I'd like to offer a contrary position to the concerns that have been raised here today, relative to LSPs, that most of the concerns -- or all of the concerns that have been raised are that the RP holds the purse strings and therefore the potential is there for abuse. I would like to, from the perspective of the RP, just offer the perspective that the LSP might also be overzealous in the work, might be feared -- especially if you're going to be taking someone's livelihood potentially away from them -- that they might drag out the process longer. So while we're certainly supportive of it conceptually, we'd be interested in seeing the details of the program.

SENATOR SMITH: Eric, have you heard of the golden rule?

MR. DeGESERO: Pardon me?

SENATOR SMITH: Have you heard of the golden rule?

(laughter)

MR. DeGESERO: Yes, sir.

SENATOR SMITH: All right. Well, it applies here. He who has the gold makes the rules. (laughter)

MR. DeGESERO: If the only way-- If your path to your NFA, which is the end game, is through the LSP -- and I understand that you

would look to safeguard it by having it kind of a blind third party, in terms of the Department appointing it, paying into a fund, and things of that sort -- so you're removing that. So if the RP doesn't have tetrahooks -- and I certainly understand your concern -- that makes the point of the LSP potentially losing their license, or certification, or however the program is going to be established, all the more likely-- So just to -- again, that concern.

Relative to homeowner USTs: I'd be interested in talking to the Department. It's something that we have discussed here previously, relative to what their thinking is -- have they seen issues pertinent to that? Maybe they're not-- We, as an industry are -- have developed new methodologies. There are new tanks. This is a process where market forces are really taking care of this. Most tanks getting replaced are being replaced with above-ground tanks as part of a transaction.

Regulated USTs -- I'm not exactly sure where the Department feels there is a breakdown, or where State law is deficient in addressing the Energy Policy Act of 2005 changes, but look forward to discussing that with the Department.

And lastly, relative to the dry cleaners-- FMAs concern is that the funding source for this is going to be the dedicated moneys that have been set aside, relative to UST remediations. These moneys have been diverted once already. There are no new moneys going into this fund. As we've testified at the last hearing, or the hearing before last, a lot more money could be put out on the street if there were some procedural changes relative to how EDA handles the program. The program is an unqualified success. In 11 years, the leaking tank program has processed 2,050

applications. In 18 months, the non-leaking program has processed 2,050 applications and could be putting a lot more out the door if there were some assurances from the residents. As you mentioned, Mr. Chairman, many of your constituents, many of the citizens of the state are distrustful of government, and fear entering into a contract for performing a service on the promise of government funding and then having that rug pulled from under them.

We look forward to working with this Committee, and I thank you, sir.

SENATOR SMITH: Thank you, Eric.

Our next speaker is Dennis Toft, from NAIOP.

Dennis.

**DENNIS M. TOFT, ESQ.:** Thank you, Senator, members of the Committee.

My name is Dennis Toft, I'm a Partner with the law firm of Wolff & Samson, where I head the environmental practice. I'm here today on behalf of the New Jersey Chapter of the National Association of Industrial and Office Properties.

Having the benefit of being near the end, rather than just read some remarks I'd like to address some of the questions that the Committee has come up with during the course of the process we've observed for the last several hours. And I will try to be brief and to the point.

One thing that's clear about any licensed site professional program is that it needs to have credibility with the regulated community and with the public at large. That gets into how it's funded, who pays for what. But also, importantly, at the end of the day, the financial community

and the developers, who NAIOP represents, need to be able to rely on their licensed site professional to deliver an end product that's a finance -- creates a financible deal. It doesn't do anybody any good just to shift a job to folks if the end product you get doesn't allow one to rely on it.

I think everybody is in favor of speeding up the process and making it more efficient. But any licensed site professional program needs to take into account that mechanism to make sure it's as sellable to the public at large as it is on Wall Street. And so I urge consideration of a mechanism, such as Senator Smith suggested, either to escrow the funds so that it can be paid, so that there is no economic pressure on the licensed site professional. By the same token, it needs to be one that moves efficiently to a defensible end result.

With respect to the issue of remedy selection: I know you asked Mr. Senior about his view of adding flexibility to the program. We've also heard commentary from folks who are worried about cumulative impacts and provisions in the statute that prevent consideration of cumulative impacts at sites. I suggest to you that one way of considering both issues is to look at risk-based corrective action programs that are implemented in other states. There's been some resistance over the course of history, through the legislation, of looking at those programs. But if you look, for instance, at the Illinois program, where sites are tiered, it's tied to end use, it's tied to the surrounding area -- and clean-up objectives are driven based upon those objective risk factors rather than having set numbers. It adds both flexibility and the ability to look at what surrounds a site and what an end use may be. So I would commend to the Committee

that some consideration be given to looking at a full risk-based corrective action approach as these reforms are considered.

With respect to long-term stewardship, there are a number of insurance companies and others who have proposals that they've made in the past to create mechanisms where the funding comes as a result of the process. So a sufficient amount of money is charged during the course of the remediation process to fund the program, in return for which the performing party gets absolute certainty and avoids reopeners. So there are ways to fund that that don't necessarily use public money to fund it up front and miss those funds to make sure that it is a sustaining process.

Enforcement: Mr. Wolfe mentioned the grace period rules. Unfortunately, the grace period rules have created a mechanism where the Department is focusing efforts on taking enforcement measures against innocent parties who are doing their best to perform cleanups, rather than going after folks who cause the contamination in the first place. If enforcement is to be meaningful -- our enforcement reform is to be meaningful, the grace period rules need to be revisited.

SENATOR SMITH: How would you modify them?

MR. TOFT: Well, I think other than absolutely doing away with them, I think they should apply to RP sites, rather than to people who sign memorandums of agreement as a first cut. I think that you need to do away with this process where the only letter a case manager can send out to you is either a notice of deficiency or an approval, rather than just a checklist form. There needs to be a better dialogue. The good case managers now ignore the rules and use other forms of communication so they don't have to send out notices of deficiency. There's not much point

in having a rule that has to get ignored in order to make the process move forward.

In terms of the concept of having overtime -- staff overtime by the Department, it's something that NAIOP has supported for many years. Our developer members, in order to move the process, are willing, ready, and able to pay enhanced fees. If it means paying for people's overtime rates, we're all in favor of it. It seems like something that could be done relatively quickly and should be done as soon as possible.

SENATOR SMITH: Stop for a second. Okay?

MR. TOFT: Yes.

SENATOR SMITH: Irene, can you come back up?

Dennis's comment about the notice of deficiency and the grace period counterintuitively seeming to get the process bogged down-- What do you think about that?

ASSISTANT COMMISSIONER KROPP: No, and that's what this chart was about.

Let me just take a second to say, notice of deficiencies are not enforcement actions. What they are, are comment -- they used to call them *comment letters*. They're the case team's comments back to whoever is conducting the remediation to let them know where their submittals are not consistent with the tech regs and other regulations. So there's no enforcement authority behind the notice of deficiency. They are cumbersome, but not because of the grace period rule, but because we've been using compliance and enforcement screens within the NJEMS database to develop these documents.

We just, last week -- you missed it -- changed the process and went back to allowing staff to use strictly word documents to create these notices of deficiencies so that there's a streamlined process to get them out the door. And that was after a year of moving forward.

But just let me say very, very quickly, notices of deficiencies -- that's what this chart is about. We've issued 2,000 or so since we started doing grace period. You can see almost all of them come into compliance. We (indiscernible) 144 notice of violations. None of those ever go to innocent parties. Those go to responsible parties. Anybody with an MOA in the voluntary clean-up program does not get an NOV or do not get penalties. And we've issued 72 penalty assessments since grace period came on board.

The point of the chart is: started sending out notices of deficiencies. They absolutely got the consultants and the regulated parties' attention. We've stopped the back and forth between the staff and the consultants. And people are coming into compliance a lot quicker.

SENATOR SMITH: So you see them as an effective tool?

ASSISTANT COMMISSIONER KROPP: Extremely effective.

SENATOR SMITH: Okay. Thank you.

Dennis, back to you.

MR. TOFT: Okay. Thank you, Senator.

I respectfully disagree.

SENATOR SMITH: The great thing about this country is, it's okay.

MR. TOFT: It's a wonderful thing. (laughter)

First of all, there are innocent parties who have gotten NOVs. I represent one of them. Unfortunately, it's an innocent party who, because of our archaic ISRA statute, had to sign a remediation agreement rather than an MOA. It's an unfortunate consequence of the grace period rules. And there are other circumstances where that happens.

Secondly, calling something a notice of deficiency has an effect far beyond the consultant or the party performing the remediation. If Irene or people from the Department would like to explain to some lenders and other investors in projects that a notice of deficiency is really just a comment letter, even though it's called a *notice of deficiency* -- that's where a lot of the problem gets created in the process. So I think--

SENATOR SMITH: Let's tell the truth amongst everybody in the room, which is, the people who really are responsible for the cleanup of New Jersey and for the United States of America are the banks.

MR. TOFT: That's exactly the case.

SENATOR SMITH: You have to dance to the lenders too. So I don't know that it's such a bad thing that you get the attention of the lender that this has to be done quick.

MR. TOFT: In any event, I'd also like to address, briefly, the OPRA issue, and defend my profession and the engineers.

SENATOR SMITH: Okay.

MR. TOFT: The reason we make OPRA requests and look through the Department's files is that the innocent purchaser laws require us to do due diligence on projects and go to the Department to get that information.

SENATOR SMITH: Right. But did you hear the comment from the Commissioner that all you're paying for is the copying charges? You're not paying for the 25 percent of the professional staff time that is consumed to do those searches. Do you think it would be fair for you or your client to be paying those costs?

MR. TOFT: I think it would be fair for there to be appropriate charges.

SENATOR SMITH: Okay.

MR. TOFT: I think it would be-- The other problem created by OPRA is, it slows down the process in other ways. On numerous occasions, I've had to call case managers to ask where something was in the review process and was told that I can't review the file because it's been OPRA'd.

I think outsourcing is a great idea. I think having a process where parties, when they submit documents -- if you have to submit them electronically at the same time, so an OPRA database of those documents can be created to be easily accessible and publicly accessible, makes a lot of sense. We do it in the Federal courts now. There's no reason why electronic filing can't become more of the norm in the Department. I know the Department requires most things be submitted on CD now. And there's got to be a way to create a funded program to allow that to happen to make it easier for everybody.

SENATOR SMITH: Okay.

Irene, if I could ask you, what do you think about that idea, at least prospectively?

ASSISTANT COMMISSIONER KROPP: I will put on my hat as previous Chief Information Officer for DEP a couple of years ago. It's a great idea. I'm all about electronic submittals. Major infrastructure and IT costs are necessary to pull it off. We don't have the servers, we don't have the Internet capacities, we don't have the computers on people's desks. One of the things that happens in our budget process is we lose, and lose, and lose operating funds; we lose, and lose, and lose money for IT initiatives. It would take a major influx of funding for IT to bring us into this century and be able to get everything electronically.

SENATOR SMITH: You know, not that you don't have enough to do, but maybe you can give us an idea of what the cost would be for that infrastructure.

ASSISTANT COMMISSIONER KROPP: Sure.

SENATOR SMITH: Thank you.

ASSISTANT COMMISSIONER KROPP: I can do that.

SENATOR SMITH: Dennis, back to you.

MR. TOFT: Thank you, Senator.

I think that I just would commend to you a couple of other things to think about as you go through this process. There are other things out there that impede brownfield redevelopment and other agencies beyond the Department involved. The Department of Community Affairs, through the condo registration process, creates obstacles that can be addressed through some of the reforms suggested here, such as the permitting process for long-term remedies, creating funds for long-term stewardship.

There is still a great deal of uncertainty with respect to NRD liability. It doesn't seem to be getting any better. People who want to

redevelop sites, who are responsible parties involved, need to find a way to solve that process in a more efficient manner than is the case now.

I think that really concludes the comments that I have this morning.

I thank the Committee for this opportunity.

And just as a commercial, one of my other hats is Chairman of the Brownfield Task Force in New Jersey. The Task Force is available to assist the Committee in the process in any way you deem appropriate.

Thank you.

SENATOR SMITH: Well, the one that we did not talk about at all today are the last two or three things that you mentioned with regard to DCA, and condo associations, etc. If your group wouldn't mind sending in some suggestions on that, we'd like to see what they are.

MR. TOFT: Absolutely.

SENATOR SMITH: All right.

Any other questions for Dennis Toft? (no response)

Then our last witness for the day is Stewart Adams.

UNIDENTIFIED SPEAKER FROM AUDIENCE:  
(indiscernible)

SENATOR SMITH: What's that?

MS. HOROWITZ (Committee Aide): Abrams.

SENATOR SMITH: Stewart Abrams.

**S T E W A R T H. A B R A M S:** Abrams.

SENATOR SMITH: I'm sorry.

MR. ABRAMS: That's all right.

Thank you very much.

Last but not least, hopefully.

All right, my name is Stewart Abrams. I'm a Senior Remediation Specialist at Langan Engineering and Environmental Services. Until recently, I was national director of remediation at a well-known national consulting firm. I've probably worked in about 20 different states, most notably Massachusetts, and have worked very closely under the LSP system. So I want to give you my personal observations on the LSP system. And one other thing, I also serve on the DEP's Environmental Justice Advisory Council, so I see that side of the story a lot too.

One thing also I'd just like to repeat -- that people know pretty obviously is, Massachusetts, in some ways, is very similar to New Jersey: similar industry base, similar population, similar sites, similar things driving the cleanup. But I've got to tell you in summary, they're getting more cleanup for less money done quicker than we are here -- more cleanup for less money than we are here.

And let me tell you why. In terms of remedy selection, they have risk-based standards, and they're very clearly laid out, and there's a lot of flexibility there. They also have -- high-priority sites are now moving into the system. They started out, in 1994, as a more modest system where the lower priority sites were put into place. This system in Massachusetts has been in place since 1993. The first LSP licenses were granted in September '93. So one of the things that's notable about the LSP system in Massachusetts is, it's part of the culture, it's part of the way they do business. And everybody is committed to making it work.

Let me tell you a little bit about what being an LSP in Massachusetts actually means. First of all, it's considered prestigious. It's

probably equal to or more prestigious in the environmental world than being a professional engineer or a professional geologist. People--

The whole issue of the gold, Senator-- One of the things -- the strong incentive in the system in Massachusetts is, every LSP can be expected to be audited at least once every three years, sometimes once every two years. And that audit will be a serious audit of his -- of all his decisions. And if he gets a black mark on his record, you can go to their Web site and just type in an LSP's name and see his record. If he gets any black mark on his record, his career is severely impacted. If he renders an opinion that's overturned, he's basically ruined his career. So there is a strong incentive on the gold side that, if he wants to maintain himself as an environmental professional, he has to render opinions that don't get overturned or doubted by the DEP in Massachusetts.

SENATOR SMITH: What's the payment system? Is it an escrow or direct payment between the client--

MR. ABRAMS: Direct payment. A lot of times, the LSP is the consulting firm project manager. Sometimes he's somebody who consults. But he's part of the project team. It's a direct payment. He works for a consulting firm.

Personal experience-- You know, I work on very complex sites all across the country. In personal experiences, you sit there and you go through the strategy. The LSP sits there, and steps back, and listens to what is being said -- the responsible party might be in the room, the attorney -- and says, "I don't know. I think you can't do that." And we go, "Great." And we respect that opinion, and we develop a different strategy.

I also want to emphasize, it does not put the DEP out of business in Massachusetts. There is a strong collaborative culture. So, for example, when we would come up with a strategy on a Massachusetts site, what we would do is, the LSP would say, "Sounds good, but before I render my opinion, I'm going to go down to DEP and run it by them." And there's somebody assigned to the case. It's not the LSP out on his own. And he can usually get that meeting within a week. And because it's the LSP's responsibility in the end, the DEP guy doesn't feel like he has to know the file by heart. He knows he'll get a good briefing. And what will happen is, the LSP, sometimes by himself, will go down to the DEP and say, "This is what we're thinking about." And the DEP guy might say -- or gal -- might say, "I think you need another well here," or, "I think you need to monitor differently over there." And the LSP will say, "I'll bring that back to my team, my client, and we'll decide." And so when these opinions are rendered, they're not rendered in a vacuum. The DEP knows, to some extent, what's being done. And the collaborative aspect is very, very strong.

Also, just touching on the prestige of the profession, number of opinions is very important; so the ones that are the most experienced -- again, the gold. The more experience you get rendering opinions, the more your opinions are not overturned, the more prestigious your career.

From the responsible parties' side, a lot of responsible parties honestly-- You know, there's been some discussion today about breaking that consultant-responsible party kind of attached-at-the-hip-- Quite honestly, some responsible parties are not especially thrilled with this system, because they know that the LSP serves two clients, not just him who has the gold, but he knows that the gold also runs from the DEP and

from the licensing board of the LSP. So he is literally someone who has a foot in both camps.

I wanted also-- There was some discussion today about the audits. You heard, I think, 20, 25 percent of all sites have some deficiency. The vast majority of those deficiencies are usually minor administrative. That is, an extra sample has to be taken and gone back. In a number of occasions, an additional monitor well or something like that has to be done. It's only -- in less than 1 percent of the cases is the remedy itself overturned. If you have a remedy overturned, and you're an LSP, your career is over.

There is a strong public notification aspect to the LSP system so that that LSP almost always -- especially on significant cases -- has to stand before the public and tell them what his opinion is. So that's another constraint.

SENATOR SMITH: How does that happen?

MR. ABRAMS: Typically, there's an outreach. A lot of times on higher-profile cases there's a requirement for a public hearing. My most-- I'm not an LSP, but I've worked a lot, as I said-- I'm a New Jerseyan. But one of my notable cases-- We had a citizens advisory committee, and we had to meet with them every six months. And the LSP would talk through the regulations, and I would talk through the technology with the citizens. But one of the amazing things about it is, because the LSP is making these decisions, the cleanups move quickly. So, for example, this citizens advisory committee that we worked with was thrilled with us. Why? Every six months we came to them, and we had made progress. There was no waiting for DEP approvals. We were making

progress. So every six months something else was cleaned up, some other accomplishment was made.

SENATOR SMITH: All right. To your knowledge, in the Massachusetts program, has the public or the state ever been burned by this program?

MR. ABRAMS: Yes, absolutely. There's been situations where they have been burned. But the state reserves the right, under whatever-- The state reserves the right to take back its authority. And so--

SENATOR SMITH: How does that work, for example, with the equivalent of our no further action? Banks want NFAs before they're going to lend to those properties. If the state of Massachusetts has the ability to say, "You made a mistake. We're taking it back," does that create a problem financially?

MR. ABRAMS: Well, you see-- And there is-- It's a little bit cultural up there. But what happens is, if you really think that that's really, really important to you, you go hire an LSP that's rendered a hundred opinions, you hire an LSP that maybe has dealt with that same case manager before, you hire an LSP whose dealt with those contaminants before. So it becomes like anything else in our engineering profession. You're starting to focus not just on any old LSP, but the one with the appropriate qualifications so that you have strong confidence that when they render that opinion. There is a lot of respect down in the state capital for that gentleman's or woman's opinion. And that person has the requisite experience to render an opinion that will stand up. Because, honestly, there are no guarantees in any of this. An NFA in New Jersey can still be an imperfect document. But a lot of the banks have confidence in it.

Occasionally there are redevelopers who want to see better. But you still always, in Massachusetts, have the right to go back to the state and ask the DEP to render the opinion, but then you have to wait for your turn. And it can be months, just like here, or longer. Actually, it takes about six months in Massachusetts. I was comparing notes with a colleague. And I said, "Well, we would wish we had six months."

I don't know if you have any other questions. I mean, I'm personally not an LSP. I can reach out to-- I have friends who are officers in the Massachusetts LSP society. I could suggest to them that at the appropriate time, they could come down and visit with these Committees. We could find a way for you to learn more about the system. It's worked for them.

SENATOR SMITH: Assemblywoman.

ASSEMBLYWOMAN VAINIERI HUTTLE: You were last, but certainly not least. You certainly provided an insight for me, anyway, on the LSPs. But just a quick question: How much are the LSPs? Just give me a range for the developer to have that in lieu of a caseworker.

MR. ABRAMS: It's part of the package. Typically the LSP might be the project manager at the consulting firm. They actually-- It's just an additional qualification when you're hiring the consulting firm. So there's no separate fee, per se.

ASSEMBLYWOMAN VAINIERI HUTTLE: But there has to be additional costs to hire this highly regarded professional, correct?

MR. ABRAMS: Yes, to some extent. The more experienced--

ASSEMBLYWOMAN VAINIERI HUTTLE: In Massachusetts -- your experience about?

MR. ABRAMS: They might be billing at \$150, \$200 an hour. I'm an expert on remediation technology. If it was a technically complex -- technologically complex site in Massachusetts, I might get hired. And then the client would say, "Ooh, you're an LSP too. That's great, because I will need you to render the opinions as well as making sure the driller gets to the site on time."

SENATOR SMITH: Just a couple -- two quick comments.

You're our last witness, as far as I know.

Number one, you really have peaked, I think, the Committee's interest with regard to the Massachusetts program. I've asked Kevil and Judy to see if we can get the Massachusetts people on by video conference. We did it with-- When we were talking about electronic waste, we talked to the California people.

MR. ABRAMS: Right.

SENATOR SMITH: We're shooting for the May 19 meeting, just as a little heads-up to Irene and DEP.

And I think what we want to do is get our questions ready for the meeting. It sounds like something is going on in Massachusetts that -- there are some things we may want to take and use in New Jersey.

I do appreciate you bringing this to our attention in the way that you did.

MR. ABRAMS: Sure.

SENATOR SMITH: And then my last comment is, we've got a long year ahead of us to get this done right. As you can see, there is nothing easy about this issue.

But in the category of a little rest and relaxation, all the members of the Environment Committees, Assembly and Senate, have been invited to the World Series of Birding on Mother's Day weekend. And this is a tremendous tourist event for the State of New Jersey. I've gotten my wife, even though it's Mother's Day, to commit to it. So we're going to be down Friday night. I hope the members of both Committees will consider it. I think it will be a real hoot. (laughter) I understand from the Audubon people that Saturday morning we're going to do a half-day of birding. They've assigned us to a team called the Wandering Tattlers. So hopefully members of the Committee will attend.

Assemblyman McKeon.

ASSEMBLYMAN McKEON: Just to give them the correct prompts, somebody who is a close friend of mine is the captain of the Wandering Tattlers. So I'm coming clean to everyone. Mark Levi (phonetic spelling) -- he's a great birder. And that will be a good event if we could get down there.

As it relates to today, I just wanted to say thank you -- and I know Senator Smith would share the same sentiments -- not only to all of the witnesses, as well as the great people of DEP, but most certainly to my colleagues in the Legislature.

Assemblywoman, thank you for hanging in to the very end.

And, as always, nonpartisan and partisan staff are no less than heroic, and you have to be to help through these efforts over the next year, as we get to the finish line on bringing some great change in further protecting the environment, as well as creating the correct business climate here in New Jersey.

Thank you.

SENATOR SMITH: Thank you, all.

**(HEARING CONCLUDED)**

## **APPENDIX**

**Joint Hearing of Senate Environment and  
Assembly Environment and Solid Waste Committees**

**Commissioner Lisa P. Jackson  
Assistant Commissioner Irene S. Kropp**

**April 15, 2008**

Good morning Chairman Smith and Chairman McKeon and members of the Senate and Assembly Environment committees. I would like to thank you for the opportunity to appear before you today and discuss what I consider a major priority for the State of New Jersey -- reform of the Site Remediation Program.

In October 2006, I testified before the Senate Environment Committee that, although New Jersey has one of the premier site remediation programs in the nation, Assistant Commissioner Kropp and I identified where improvements could be made. At that time I highlighted the fact that there were in excess of 16,000 contaminated sites that required our attention. Today, we have reached a milestone. There are more than 20,000 cases currently in the queue at DEP -- far too many cases for the program to address in any reasonable timeframe. And under the program's current structure, sites will remain unremediated for perhaps years to come.

The obvious problem with this is that it equates to contamination remaining unaddressed, potentially spreading and potentially impacting the health of our residents. Many of these sites are in urban communities where residents are already struggling with a multitude of other quality of life challenges. Another drawback to these sites remaining unremediated is that properties that could be developed and placed back on the tax rolls or converted to open spaces, remain blighted, unused lots, compromising the economic vitality of our state. Accepting the status quo is unacceptable. It is critical to the health of our citizenry and environment, as well as to the health of our economy, to remediate contaminated sites in New Jersey as quickly as possible while maintaining the strict clean up standards we have always applied.

Subsequent to my October 2006 testimony, the Department decided that key to the development of meaningful legislative reform was receiving input from our stakeholders. We convened a series of stakeholder sessions and posted 11 white papers in August 2007 outlining what we believe to be the major issues. After receiving meaningful input from stakeholders on the white papers, we expanded and refined those papers and re-posted them as "final" last week. This process provided the Department with additional insights that have shaped our recommendations for reform, which we are discussing today. Due to stakeholder input and our analysis of the program, the reforms outlined today while reflecting the overall concepts discussed in my recommendations of 2006, offer a slightly different approach.

Let me now ask Assistant Commissioner Kropp to present our recommendations for major legislative reforms, which are presented in order of priority, and the reasons they are needed.

1. Licensing Environmental Consultants. As the Commissioner noted earlier, we now have more than 20,000 active cases in the Department. As you can see from this chart, the number of new cases coming into Site Remediation has dramatically increased over the past few years without a commensurate change in program resources. While the number of cases closed has also increased and is reflective of the dedication of our staff, we are not able to keep up with an ever-increasing work. As a result the gap between new and closed cases continues to grow. The majority of the new cases we receive are transactional cases. Cases that are in need of a No Further Action letter (or NFA) or Remedial Action Work Plan (RAWP) approval from the Department because of financial reasons and not necessarily because they are highly contaminated sites threatening human health or the environment. Examples of these cases include: homeowners in need of a mortgage, developers in need of Department approvals as a requirement of their financial institution or insurance company, or industrial sites selling their properties or ceasing operations. It is important to note, not all of these cases are in the Site Remediation program because current legislation

requires us to regulate them. The transactional deadlines associated with these cases often dictate our priorities and where we focus our limited resources. We are often asked to expedite these sites for economic reason by mayors, developers, community leaders, legislators, and others – for good cause because they are the key to economic revitalization. But we cannot prioritize every redevelopment site in this way, especially with budget constraints and strained resources. So, two problems result from our large caseloads, we cannot focus on the most important environmental sites, and redevelopment projects that would have positive economic impacts are seriously delayed.

We are recommending a 2-pronged approach that will fix this problem over time. The first, which we are already implementing, is an examination of the Site Remediation program's business practices. We are currently implementing policy changes to streamline our review of cases and expedite cleanups while maintaining our strict environmental standards. To date our focus has been on smaller, lower risk cases. The second is to license environmental consultants in the State in New Jersey who perform site investigations and conduct remedial actions in order hold them more accountable for the quality of the work products they produce. These two actions, together, will reduce the number of backlogged cases we have in house. They will offer a more streamlined process for the majority of new cases, provide us with the ability to take enforcement action against consultants who do not comply with our regulations and ensure that cases do not linger unattended for years.

Under this plan, cases will be addressed more rapidly and properties will be developed to desired uses. We will be cleaning up sites and stimulating economic vitality. We will not compromise on our standards or protection of the environment and public health. Nor will we delegate the inherently governmental functions of site remediation to private entities. The Department will maintain the functions associated with the issuance all NFA's, review all cases with receptor and off-site contaminant migration impacts, audit cases based on potential risks and expand our oversight for the "worse" cases and for those with recalcitrant responsible parties.

We recommend that legislative reforms authorize us to: 1. impose strict requirements on licensed consultants, 2. develop a tiered approach for the review of cases where lower risk cases receive a lesser degree of oversight, 3. adopt a new enforcement program that will enable us to revoke or suspend the license of any consultant that does not adhere to a strict code of ethics, and, 3. issue penalties to consultants who do not perform in accordance with our regulations. Our goal is to loosen the reins between consultants and those who pay them and for the first time hold individuals truly accountable for the quality of the remediations they conduct.

One last comment on this subject. Originally we considered adopting the Massachusetts Licensed Site Professional (LSP) program. That is not where we ended up. Although, we have chosen not to adopt that program as is, it is an extremely effective program. Today, you will most likely hear concerns about the Massachusetts program. Let me take one minute to provide you with statistics from the Assistant Commissioner of the Massachusetts DEP. Since its inception in 1993, greater than 30,000 cases have moved through the Massachusetts LSP program. The Massachusetts DEP closes approximately 2000 – 2500 cases each year and the average time to close a case is one year. Prior to enacting the LSP program, the Massachusetts DEP closed out between 100-200 cases each year. Last year, they performed screening audits on approximately 2600 case – that is essentially everything that came into the program. They performed field audits on 325 cases and comprehensive audits on 160 cases; these audits were conducted based on concerns noted during the earlier screenings. Additional site samples and documentation are occasionally required as a part of the comprehensive audit process. That happened last year for about 60% of the cases that receive the comprehensive audits; this equates to less than 5% of the overall cases processed. And more importantly only 10 final decisions rendered by LSP's were revoked through this audit process. So less than 1% of the cases that are closed were reopened because of environmental concerns.

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2. Remedy Selection. When the Industrial Site Recovery Act was amended previously, parties successfully argued that the Department's requirement to evaluate different alternatives slowed the remedial process. As a result, the Department's role in the remedy selection process was reduced for all site cleanups to the point where we could overrule a remedy only if we could "prove" that a remedy was unprotective. While some will argue that the statutory change resulted in more cases actually getting cleaned up, many cases still languish in the system for greater than 10 years. As you can see on this chart, over 4000 sites currently in the system have been there for greater than 10 years. Many of these are the larger, more complex industrial sites. We believe the extended timeframes between site identification and final cleanup are more directly related to a repetitive back and forth between consultants and staff, recalcitrant behavior on the part of some responsible parties and the prescriptive nature of our current business processes; not remedy selection. We are recommending changes to all of the problems, I noted. But as a priority, the selection of remedies for certain categories of cases needs to be placed back into the hands of the Department. Specifically, we believe the Department should have the ability to select remedies for residential end uses, especially single-family homes on contaminated sites and residential developments on landfills. Additionally, remedy selection for educational and childcare facilities should be subject to greater Department input. It is critical to ensure these facilities are properly located. Local governments officials and school boards are key to making these informed decisions. But by the time some of these cases come into the Site Remediation Program, key financial decisions have already been made and it is next to impossible to reverse the course of action. Another situation that would warrant expanded Department involvement would include a case where a responsible party is recalcitrant or proposing a remedial solution that prolongs a cleanup. The Department should have the authority to say when a timeframe associated with a proposed cleanup is unduly protracted. Lastly, we believe that, if a proposed remedy would leave an otherwise valuable piece of property "unusable" for eternity, and a municipality has no choice but to leave that property off its tax rolls, the Department, in consultation with the municipality, should be able to overrule the remedy.

3. Permanent Remedies. You will undoubtedly hear today that the Department should only approve “permanent” remedies for many cleanups; including those that involve residential properties, educational and childcare facilities or those in overburdened communities. Although we agree that, in these cases, the Department should play a greater role to ensure that remedies are protective – not just on the day we approve them but over time – we do not agree that “permanent” remedies – those that meet our strictest cleanup standards - are feasible in all these situations. As an alternative, we are recommending the following solutions to address these concerns. 1. Establish “enhanced protection” remedies for certain sensitive uses, such as new schools and childcare facilities, 2. Provide financial incentives for permanent remedies, (I will discuss this further shortly), 3. Strengthen the effectiveness of institutional and engineering controls by establishing a new permit program and incorporating their existence into the “One Call” system, and, 4. Establish mandatory timeframes for completion of remedial investigations and remedial actions.
4. Finality and Protection Against Remedy Failure. One issue raised by the business community during the stakeholder sessions was their desire for the Department to provide for “finality” as part of the cleanup process. We believe the ability to do this exists through the use of the previously established, but never used, Remediation Guarantee Fund coupled with the expansion of our existing financial assurance requirements. The Remediation Guarantee Fund was set up to provide funding for the Department to use to remediate properties when a person, who was required to set up a remediation funding source, failed to conduct that remediation. Even though we already possess the ability to access a remediation funding source for the same purpose. The fund was seeded with \$5M that still exists and it was suppose to grow through cost recovery and investment of the original \$5M. Under current law, there is a 1% annual surcharge on certain financial assurance, which equates to approximately \$2.0 M annually, that is deposited into the HDSRF fund. We are recommending a legislative amendment to take this 1% annual surcharge and divert it to the Remediation Guarantee fund. We would also expand the surcharge requirement to all

financial assurance mechanisms; it currently does not apply to self-guarantees, which is the mechanism of choice for most of the larger corporate responsible parties. This action coupled with a limit or elimination of the use of self-guarantees would generate approximately \$14M annually, which could be deposited into the Remediation Guarantee Fund. The fund could then be used by anyone who implements a permanent remedy to cover: 1. Order of magnitude changes in our soil standards or, 2. Subsequent changes in use of the property. This would provide incentives for permanent remedies that do not exist today.

The fund could also be used to provide grants to innocent third parties who purchased a site with an NFA to cover costs associated with: 1. Remedy failure, or 2. Order of magnitude changes in our soil standards. This would provide new protections to homeowner associations and others who end up responsible for institutional or engineering controls when an LLC dissolves, a company goes bankrupt or for some other reason there is no longer a viable entity to finance additional remediation.

5. Incentivizing Brownfields Redevelopment. As clearly noted in Governor Corzine's Economic Growth Strategy, the redevelopment of contaminated sites is critical to economic revitalization of New Jersey. We strongly believe that the public-private partnership associated with Brownfields Redevelopment is key to helping our urban communities flourish. One deterrent to redevelopment is the Spill Act liability that one inherits when they knowingly purchase a contaminated site. The legislature has, in the past, amended the Brownfields and Contaminated Sites Act to limit this liability in certain circumstances, but additional liability limitations need to be enacted to further encourage economic growth. We should limit the liabilities associated with purchasing a contaminated site by an innocent third party to the cleanup of the site itself and the prevention of future contamination leaving the site. Liability for off-site contamination caused by the original Spill Act responsible party should remain with that party and the Department should aggressively pursue the original discharger. In the event that a viable entity does not exist, we should use public funds for those cleanups. The Department would still, however, require the

developer to perform an up-front receptor evaluation so that immediate environmental concerns can be identified quickly and addressed.

6. Expanded notification to the locals – Public Law 2007, c.1 (the Kiddie Kollege Bill) went a long way in ensuring that changes in use from an industrial type to a child care facility or school would not occur unnoticed but would in fact be caught during the issuance of a construction permit or certificate of occupancy. It also expanded notification to local officials. We are recommending that this statute be expanded to include changes in use from any industrial/commercial use to residential. We are also recommending that, any time a property regulated by the Site Remediation Program is being developed to an end use that includes a child care facility, a school or residential housing, it be required to undergo a preliminary assessment and site investigation consistent with our Technical Regulations. This requirement should apply regardless of the fact that the site may have received an NFA from the Department previously. The reason being that many people in the general public are unaware of the differences between an unconditional NFA which has no limitations and conditional NFA which has on-going commitments.
7. Underground Storage Tanks USTs - The Department processes approximately 4000 - 5000 new Homeowner Underground Storage Tanks cases each year. The only way to ensure that our children and grandchildren do not inherit the problem of leaky USTs is to ban the installation of new homeowner USTs and to only allow for underground storage tanks with secondary containment when there is no option to use an above ground tank. Currently EDA administers a program for non-leaky underground tanks and provides grants to homeowners of \$3000 to help cover the cost of replacement. If this grant amount is raised to \$4000, we believe that the cost differential to install secondary containment would be covered for situations where above ground tanks are not an option.

Additionally, for New Jersey to be in compliance with the Federal Policy Act of 2005, and to ensure against future releases from regulated underground storage tanks,

we are recommending that all new or replaced underground storage tanks and piping be secondarily contained. For regulated underground storage tanks, secondary containment has become a quasi-industry standard and since 2005, 587 out of 595 regulated USTs that have been installed in New Jersey were secondarily contained. The changes will ensure a New Jersey standard that continues the trend of better protection for our drinking water supplies.

Lastly, to ensure that remediation funding source requirements in the regulated UST program are similar to those in other SRP programs, we are recommend amending the UST act to require an owner/operator confirm that their financial assurance mechanism will cover all remedial costs for discharges found at the site. We further recommend allowing the DEP to draw on this funding source if the operator/owner does not comply with remediation requirements.

8. Drycleaners - Since it was first introduced in 1934, perchloroethylene (Perc) has been used as a cleaning solvent by the dry cleaning industry. Perc is considered a potential carcinogen and is regulated as a hazardous substance. It is often found as a contaminant in our aquifers and has impacted drinking water supplies along with creating vapor hazards in residential dwellings. Currently, there are about 2000 dry cleaning facilities operating in the state and an unknown number of closed facilities. The Site Remediation program has only about 300 dry cleaner sites within its universe of known contaminated sites. The State Coalition for the Remediation of Dry Cleaners (SCRD) estimates that about 75% of dry cleaners have some level of contamination associated with them. This contamination is predominantly caused by past operations. Often the current owner is not the original discharger and many facilities are co-located in strip malls or mixed use buildings with residential housing. In most cases, the current owner does not have the financial ability to pay for remediation. And as Perc is very soluble and travels far, it often impacts wells and structures miles away.

Other states have successfully addressed the ongoing remediation concerns associated with dry cleaners through the development of a state-funded dry cleaner remediation program where user fees are assessed on dry cleaning services and are dedicated to funding Perc remediations. We are recommending that New Jersey consider such a program. One option is to fund the program with money from the constitutionally dedicated UST grant fund, which currently has approximately \$108M and uses only \$7-8M each year. Grants could be limited to those facilities where the owner is not the original discharger, where the business is defined as a "small business" and where the facility is co-located with residential or commercial uses.

Lastly, there are additional smaller legislative reforms that we are proposing that will clarify and clean up existing statutes, strengthen our enforcement program and expand the use of the HDSRF funding. The complete list of DEP recommended legislative reforms will be available on the DEP website today for public viewing.

In closing, reform of the Site Remediation program is needed. There is no doubt. The option of maintaining the status quo does not exist as the environmental, health and economic consequences are too great. We believe the package of reforms outlined today provide something for all stakeholder groups. It will strengthen the Site Remediation program, by expanding enforcement, providing incentives for Brownfields redevelopment and permanent remedies, ensuring our remedies are protective at the time of approval and over time, and addressing the ever growing backlog of cases in the Department.



# ENVIRONMENTAL FEDERATION

*Working Everyday to Prevent Harm to the Environment, Public Health & Our Communities*

To: Members of the NJ State Senate & Assembly Environment Committees  
Fr: Jane Nogaki, Vice Chair, 856-912-6790, and David Pringle, Campaign Director, 732-996-4288  
Da: Tuesday, April 15, 2008  
Re: Site Remediation program reforms

We join the NJ Environmental Justice Alliance and the Sierra Club in urging you to move legislation in its strongest form to reform the state's site remediation program. NJEF appreciates that you may wish to move a partial remedy (perhaps privatization, incentives/insurance for clean-ups, and giving DEP more authority over remedy selection) by July with follow-up legislation in the fall. However, the fate of follow-up legislation despite the chairs' best intentions would be far from certain, and **if the goal is to ensure faster, better clean-ups then the partial remedy (to borrow a phrase!) described above will not get the job done and may make matters worse.**

This is as much an environmental justice as it is a public health issue. Contaminated sites are disproportionately located in urban, low-income, and minority communities. Thousands of our state's most vulnerable children and families are exposed daily to these dangerous and toxic sites. It's time that we take responsible measures to ensure that future Kiddie College's are prevented, and existing contaminated sites, especially those occupied by school children and urban residents are cleaned up.

While we understand resources are an issue, we also understand there are means to achieve those resources -- more vigorous enforcement especially of treble damages, increasing the spill fund tax and other polluter pay mechanisms, cuts in wasteful spending like Christmas tree items, pay to play, and subsidizing sprawl.

We urge you to take immediate action to strengthen and reform the state's site remediation program as current cleanup laws and regulations are seriously flawed. Examples include:

- DEP lacks power to compel a responsible party to implement a permanent remedy;
- the selection of remedy is vested solely with polluter;
- DEP lacks power to compel a polluter to conduct a "feasibility study", which is a fundamental component of federal Superfund program and considers cleanup alternatives and subjects alternatives to public review;
- DEP lacks authority to consider health risks of cumulative exposures to multiple pollutants or multiple sites;
- DEP currently lacks legal power to enforce cleanup standards for ecological impact;
- DEP can only compel additional cleanup if it can prove that cap/institutional controls have failed, placing inappropriate burden on DEP and jeopardizing public health; and
- Public hearings are not required for major cleanup decision so the public is shut out.

That is why we urge the Corzine Administration and State Legislature (as we have going back 3 plus Administrations) to immediately develop and implement needed major comprehensive corrections to NJDEP's broken site remediation program\*, including but not limited to fundamental reforms framed by six principles:

- **Emphasizing permanent clean-ups not temporary cover-ups** -- no houses, schools, playgrounds, and daycare centers on either contaminated sites that are just "capped" or landfills;
- **Meaningful public involvement** including but not limited to community input on the clean up plan, remedy selection and redevelopment;
- **Ensuring environmental justice** -- stringent, health based clean-ups in environmentally burdened communities, assessment of cumulative risk from multiple pollutants and multiple sources, and linking clean-up to redevelopment and jobs that benefit community residents;

The New Jersey Environmental Federation (NJEF) is a state chapter of Clean Water Action. NJEF has over 100 member groups & 100,000 individual members. For more information on NJEF's campaigns, visit [www.cleanwateraction.org/njef](http://www.cleanwateraction.org/njef)

**STATE OFFICE**  
1002 Ocean Avenue  
Belmar, NJ 07719  
Ph: 732.280.8988  
Fax: 732.280.8988

**LEGISLATIVE OFFICE**  
1 Lower Ferry Road  
Trenton, NJ 08628  
Ph: 609.530.1515  
Fax: 609.530.1508

**SOUTH JERSEY OFFICE**  
223 Park Avenue  
Marlton, NJ 08053  
Ph: 856.767.1110  
Fax: 856.768.6662

**NORTH JERSEY OFFICE**  
559 Bloomfield Avenue  
Montclair, NJ 07042  
Ph: 973.744.3005  
Fax: 973.744.3069

**NATIONAL OFFICE**  
4455 Conn. Ave NW Suite A300  
Washington DC 20008  
Ph: 202.895.0420  
Fax: 202.895.0438

- **Prioritization not privatization of cleanups** including additional resources;
- **Protective health-based standards utilizing the precautionary principle;** and
- **Increased enforcement** – pulling back on voluntary clean-ups, increasing DEP field presence, assessing treble damages, empowering DEP to enforce cleanup standards for ecological impact (notwithstanding a 14 year old statutory mandate, DEP has yet to activate its ecological taskforce), etc.

**We therefore support legislation that will give more NJDEP authority to compel (and less discretion not to compel) responsible party and permanent cleanups,** not wait for parties to volunteer cleanups. Further, we propose that the burden be on the polluter to pay for the cleanup and to make the remedial action a permanent cleanup remedy, not a “pave and wave” capping of a site that leaves contaminants on site to resurface or volatilize over time as weather and site conditions change. Capping is inappropriate for day cares, schools, residential and recreational uses of a site.

**We do not support privatization (licensing of professionals to do reviews)** because licensed professionals do not have the same mission, mandate or authority to protect public health and the environment -- that is the responsibility of NJDEP. Placing government oversight in the hands of the private sector is a big mistake, and we do not believe in the public's interest.

Regarding an insurance fund to bail out failed caps, we assert that under current law, the polluter, not the public pays for contaminated site cleanup. Therefore, **any insurance scheme to pay for failing caps should be financed by the polluter, not the public.** In general, caps are inherently inferior to permanent cleanups and like lined landfills they will all eventually fail, thus they should not be used except in exceptional circumstances where no other remedy is feasible.

We appreciate the Committees' attention to our comments, urge you to avoid piecemeal and/or weak reforms, and hope we all learn the appropriate lessons from Kiddie College, the Martin Luther King School in Trenton, and Encap.

\* Some recent high profile examples of major flaws in DEP's site remediation programs are:

- Re-building a school in Camden on a contaminated site that has already failed once – the Early Childhood Development Center.
- Moving contaminated soil from the Edison Ford plant to sites all over Central Jersey in 2005;
- WR Grace and American Standard in Hamilton, Mercer County;
- Historic dumping in Ringwood by Ford's Mahwah plant;
- Schools planned, built (Camden Early Childhood Development Center), and in some cases torn down (MLK in Trenton) on contaminated sites also in Union City (a state funded Abbott school on a radioactive Manhattan Project site), Gloucester City, and elsewhere;
- Mercury poisoning at Kiddie College Day Care in Gloucester County in 2006 and Hoboken condo's in the 1990's;
- Encap development on landfills in the Meadowlands; and
- a federal district court judge admonishing the NJDEP for failing to protect the people of Jersey City from exposure to chromium.

Attachment: Comments on DEP's Draft White Papers developed from its Site Remediation Legislative Reform Stakeholder Process, signed by 11 environmental, environmental justice, and labor organizations and addressing issues of Cumulative Risk, Remedy Selection, Engineering and Institutional Controls, Acute Exposures, Public Participation, Municipal Issues, Prioritization, Historic Pesticides, Enforcement, Culture, Authority and Will.

NJDEP Asst. Commissioner Irene Kropp  
c/o [janice.brogle@dep.state.nj.us](mailto:janice.brogle@dep.state.nj.us)

Re: Comments on DEP's Draft White Papers developed from its Site Remediation Legislative Reform Stakeholder Process

October 1, 2007

Dear Ms. Kropp,

On behalf of the undersigned, thank you for the extension until today to submit and please accept these comments on the draft white papers DEP's SRP program derived as a result of its Legislative Reform Taskforce. In doing so, please note that we find the white papers so flawed that we believe they betray the supposed purpose of the stakeholder process they attempt to summarize, question what the real agenda here is, are wary of commenting for fear legitimizing the white papers, and thus do not find it a good use of our time and resources to critique the white papers in depth. That said we decided a few issues were worthy of comment as described below.

General Comments – We were pleased to read your memo sent by Dr. Shaw via email 8.29.07 to stakeholders:

“The Department will continue to move forward with developing regulations and implementing new policy as needed. It was never our intention to hold the program in abeyance until legislative reforms are passed. In fact, implementing a multi-pronged approach on an on-going basis to address issues that can be fixed without legislation has always been my message. In her October 2006 testimony, Commissioner Jackson noted the need for legislative amendments that were not discussed in our stakeholder sessions and, as such, are not addressed in these white papers. Specifically, the Commissioner testified that she favored providing the DEP with the ability to recover all of its direct and indirect costs, including legal fees, from responsible parties; increasing ISRA penalties; providing Site Remediation with civil administrative penalty authority; allowing for first priority liens for cases where the State expends any funds, not just Spill Fund monies; and providing clear authority to remove Spill Act responsible parties from the voluntary cleanup program. The Commissioner is still very interested in pursuing these legislative reforms as well as others not discussed in the stakeholder sessions.”

We were also pleased to read DEP's 9.24.07 press release on taking enforcement action against “approximately 950 responsible parties” for monitoring and reporting violations. While we fear this is too little too late, better late than never also applies. We only wish we would see a greater commitment from the DEP to make such reforms a reality moving forward.

We also have mixed feelings to say the least about the stakeholder process itself. We very much appreciate DEP's increasing the number and changing some of the individuals representing out interests. However, we remain extremely disappointed at DEP's refusal to have the meetings public, DEP ultimately dictating who should represent our community not us, and the apparent change in the process first elaborated in the same 8.29.07 email referenced above that the public's input in the white papers was not welcome notwithstanding prior DEP commitments to the contrary. Because of concerns about process, representation, and multiple repeated scheduling conflicts, our community largely boycotted the earlier meetings and representation was sporadic at times after that.

However, our strongest opinions are reserved for the draft white papers. We are extremely disappointed with what the white papers offer or more accurately do not offer. They contain little if any new information, little if any thing not previously presented especially at legislative hearings in 2005 and 2006, and little if any of NJDEP's positions on issues. In fact, it is difficult to read the white papers as little more than meeting minutes codifying the "he said, she said" between environmental, community and labor representatives (when they were present – see reference above) on the one hand and developer and responsible party interests on the other.

This was not what DEP said would be the result of DEP's stakeholder process and as a result lends greater credence to the environmental community's concerns that while, intentioned or not, the stakeholder process amounted to little more than a year plus delay, lost momentum, and wasted resources.

That is why we urge the Corzine Administration and State Legislature (as we have going back 3 plus Administrations) to immediately develop and implement needed major comprehensive corrections to NJDEP's broken site remediation program\*, including but not limited to fundamental reforms framed by six principles:

- **Emphasizing permanent clean-ups not temporary cover-ups** – no houses, schools, playgrounds, and daycare centers on either contaminated sites that are just "capped" or landfills;
- **Meaningful public involvement** including but not limited to community input on the clean up plan, remedy selection and redevelopment;
- **Ensuring environmental justice** – stringent clean-ups in environmentally burdened communities, assessment of cumulative risk from multiple pollutants and multiple sources, and linking clean-up to redevelopment and jobs that benefit community residents;
- **Prioritization not privatization of cleanups** including additional resources;
- **Protective health-based standards utilizing the precautionary principle**; and
- **Increased enforcement** – pulling back on voluntary clean-ups, increasing DEP field presence, assessing treble damages, empowering DEP to enforce cleanup standards for ecological impact (notwithstanding a 14 year old statutory mandate, DEP has yet to activate its ecological taskforce), etc.

#### Specific Comments:

#### CUMULATIVE RISK

- The WP's language in the description of the issue - "there is concern that the existing standards and remediation goals may not be adequately protective" - does not reflect the strong concerns raised by environmental justice advocates that the current system does not even begin to address the problems of multiple exposures and cumulative risk experienced by overly burdened "EJ communities".
- The WP does not reflect that the legislature intentionally prohibited DEP from consideration of cumulative risk. DEP is statutorily prohibited from considering current science regarding not only cumulative risk from multiple sites, but for cumulative or synergistic risks from multiple exposures and from multiple chemicals - NJSA 58:10B-12 d.(2) states that "The health risk standards established in this subsection are for any particular contaminant and not for the cumulative effects of more than one contaminant at a site".

- The WP does not reflect that environmental justice advocates strongly recommended that the statute in question be amended to remove the prohibition against consideration of cumulative risk (it notes only that there is consensus that the statute would need be amended in order to address this issue)
- The WP makes it appear that there was consensus that the issue of cumulative risk needs to be extensively studied and more scientific data be developed before any action could be taken. It does not reflect that many environmental stakeholders advocate for use of the “precautionary principle” to protect against health risk where there is basis to believe that there is danger from exposure to contaminants, without waiting for scientific research to prove such harm beyond any doubt.
- The WP leaves out the mention of the use of cumulative impacts not just in the level of clean ups - but cumulative impacts should also be considered when prioritizing sites for clean up and in the remedy selection process. If a site is in an area suffering from cumulative exposures - that site should be prioritized for clean up.
- The WP also does not mention that several stakeholders recommended that the DEP start implementing cumulative risk assessment now in its permitting, remediation, and enforcement activities, perhaps through requirement of a “mini-NEPA” environmental impact assessment, and to make legislative changes to enable this if necessary.
- The WP does not make clear that it was only the industry representatives who suggested that the current standards, which do not account for cumulative risk, resulted in protective standards, and proposed lowering the standard if cumulative risk were being considered.

## REMEDY SELECTION

- In its description of the issue, the WP does not reflect that there is major public concern over the inadequacy of using engineering and institutional controls and that there is host of recent examples about the failures of the current system.
- In the description of the issue, the WP further does not incorporate the position among environmentalists that one of the most significant weaknesses in the current law is the DEP’s limited role in remedy selection, whereby DEP can reject a remedy and clean up plan proposed by the developer only if DEP can prove that it poses a health risk. (instead, the text leads off with the dislike of industry to strong oversight by the Department)
- The WP also does not reflect the recommendations by some stakeholders that the public have a role in remedy selection, and that there be a formal process for community input including a response to comments or objections.
- The WP does not mention that it was estimated that 90% of all clean ups rely on engineering and institutional controls under the current system, despite the stated preference in the law for permanent remedies, illustrating the weaknesses of the current regulatory system that does not afford DEP or the public a meaningful role in the remedy selection process.
- The WP states that the concept that more stringent engineering and institutional controls could be developed specifically for sensitive population sites was “strongly supported by public and environmental advocates”. While it is correct that these advocates support stricter controls, if controls are to be used, the statement incorrectly suggests that the advocates promote stricter engineering and institutional controls, while in fact the advocates promoted limiting use of nonpermanent remedies.

## ENGINEERING AND INSTITUTIONAL CONTROLS

- The WP description of the issue does not reflect the strong statements made by many of the stakeholders regarding how the current system is failing to protect the public from

exposures, and how use of controls must be both strictly limited and much more effectively monitored and controlled. It also frames the question improperly ("What steps need to be taken to gain more confidence in the use of engineering and institutional controls without slowing down cleanups/development and adding to the cost of remediation?"). The question is more properly stated as - What steps need to be taken to ensure that engineering and institutional controls are not used at sites where there is a vulnerable population and/or significant risks of exposure, and that when controls are allowed, that there is a way to ensure that they remain protective.

- The WP states that "one stakeholder" recommended that controls not be allowed in case of certain end uses, such as residential or educational - in fact, that was the joint position of all the environmental stakeholders.
- What these stakeholders expressed is that they want complete soil excavation and active groundwater treatment (unrestricted use permanent remedy, unconditional NFA, no CEA allowed) at housing, schools, day cares, and other sites where there is a vulnerable population or risk of exposure.
- This position is to some extent consistent with but goes further than Commissioner Jackson's 10/23/06 testimony, when she said DEP should have control over remedy selection in these cases, not that permanent remedies would be mandatory and institutional controls prohibited. The WP should make clear DEP's current position on this critical issue.
- The WP does not adequately reflect the comments about how use of caps is a particular problem for EJ communities where there are so many contaminated sites either not being remediated or being capped, and such a vulnerable population risking exposure to contamination as a result.
- In the discussion about redevelopment of urban areas, the WP does not make clear that it was exclusively the regulated community that promoted use of nonpermanent remedies in urban areas on the basis that permanent remedies would discourage redevelopment, while the environmental stakeholders advocated for more complete remediation.
- The WP also does not reflect the recommendation that the brownfield/site remediation procedures do not provide for meaningful involvement in not only the clean-up but also the development and reuse of contaminated sites and its relation to remedy selection.

#### ACUTE EXPOSURES

- The WP does not make clear DEP's position on whether it needs additional legislative authority to create standards protective of health based on short term or acute exposure, and if DEP believes that it needs additional authority, the WP does not make any specific recommendation for such legislative action, even though at least both DEP and the environmental community seem to agree that it is necessary to create such standards to protect health in case engineering and institutional controls fail for any reason. The recommendation of Commissioner Jackson, as characterized in the WP - that statutes should require standards where toxicological data is available would result in regulation of only 6 contaminants - is clearly inadequate to correct the current inadequacies in the system. .
- The WP does not reflect the recommendation of the environmental representatives that cumulative risk and multiple exposures be considered in evaluating what is a "hot spot".
- The WP does not make clear that the environmental community stated a strong position against use of engineering and institutional controls for residences, playgrounds, schools, and day cares, whether acute exposure standards are created or not.
- The WP does not make clear that the environmental representatives strongly recommended establishing acute exposure/hot spot standards for all contaminants using the best data

available, and requiring removal of soil above those standards in all clean ups, in those instances that complete and permanent remediation is not being required. .

## PUBLIC PARTICIPATION

- As the WP notes, there was general agreement that increased public participation, including notification and opportunity to participate in the clean up process is needed, and that it is a flaw in the current system that there are no requirements for public participation. The WP does not make clear the position of the environmental community, however, that public participation is nevertheless largely meaningless if the community has no opportunity for comment and input into remedy selection, so that the new regulations do not address this problem.
- The WP also notes that legislative change would be required to enable the public to participate in remedy selection but does not contain any clear recommendation as to what legislative changes the DEP supports.
- The WP do not contain the recommendations of stakeholders that the public participation process be used not only for input into the details of remediation but to allow residents to have greater input on future uses of the site and overall development plans for their community.
- The WP does not reflect that several stakeholders recommended that posting of known and suspected contaminated sites be required in order to protect against exposure to toxins by unsuspecting users of the site, such as nearby residents using a site for recreation, gardening, etc., and that the new regulations allow for posting as a form of notification but do not require it.

## MUNICIPAL ISSUES

- The municipal officials made the same recommendation as some of the environmental advocates that contaminated sites should be posted to prevent exposure to toxins. This is a serious problem in many urban areas where there are numerous contaminated sites and lack of park and open space, so that residents use the sites as gardens, play areas, etc. Yet DEP did not require posting as part of the public participation process.
- Local Ordinances for soil testing/remediation. It shouldn't be left to a hit or miss approach in each town whether soil testing gets done prior to new construction. It should be a matter of course that verification of clean soil is mandatory in every town, whether by a change to the Municipal Land Use Law or some other legislative mandate.

## PRIORITIZATION

- There is no draft WP on prioritization of sites, even though that was an important topic that was the subject of a presentation by DEP staff, generating considerable discussion, and also came up in the context of discussions on other topics.
- Some of the recommendations made about prioritization, including the following, are not reflected in the WPs
  - The system used to rank sites should include as a priority factor that a particular community has a significant number of contaminated sites and other pollution sources
  - The priorities should be based primarily on health risk, and less on economic factors and development potential.

## SCHOOL ISSUES

- Much of the outcry about the problems with the site remediation program have centered around schools and daycares, and the agenda for the meeting on June 29 listed the topic as “school issues”, but there is no separate WP on schools. The discussion is partially included in the WP on historic pesticides, but the focus in that WP is on pesticide contamination at schools, particularly schools constructed on former farmland, so it cannot adequately address all of the relevant issues regarding schools and daycares. There should be a separate WP on schools.
- School siting criteria with public involvement, due diligence, etc. is not included in any of the white papers and should be
- As there was no WP, some of the issues and recommendations raised by participants, including the ones listed below, were not incorporated into the WP:
  - School issues in urban areas are broader than pesticide contamination and often involve fuel oil, lead, asbestos, unsafe drinking water, and prevalence of sites with industrial contamination.
  - There are no clear and defined clean up standards for education use. The most protective standards should apply to schools, daycares, and recreational uses for children such as playgrounds.
  - There is no program and no requirements for testing air quality at existing schools and daycares, which is a serious problem as there are many schools in urban environmental justice communities located on or near contaminated sites; the new legislation may address this issue in part, but it is subject to interpretation as to the scope of schools covered.
  - There needs to be controls over siting of schools to make sure they are not put on or near hazardous sites.
  - If a school, daycare, or similar facility is on a contaminated site, a permanent remedy, with full clean-up, should be required.
  - Funding must be made available and uniform protective standards must be imposed to eliminate disparities between wealthier and richer school districts in terms of clean up of sites and school safety.

#### HISTORIC PESTICIDE AND PESTICIDE APPLICATION ISSUES

- There needs to be general statutory requirements for
  - all existing schools to sample soils on schools grounds for contaminants like, but not limited to pesticides
  - soil sampling when there is a conversion from farmland to uses including educational, child care, and residential
- Farm sites currently under the Voluntary Cleanup program need to be **REQUIRED** to test soil and remediate contaminants prior to developing into school, residential, day care, or park uses.
- NJDEP's Pesticide Control Program (Pesticide Control Act N.J.S.A.7:13-1F licenses pesticide applicators and promotes, but **does not require** Integrated Pest Management in its certification of applicators. However, all NJ schools k-12 are required by law to have Integrated Pest Management plans and use low impact methods first. Pesticide applicators should be **required** to use IPM.

#### ENFORCEMENT, CULTURE, AUTHORITY AND WILL

- Statutory changes needed: DEP's current authority to require responsible party cleanup under the Spill Compensation and Control Act, N.J.S.A 58:20-2311 et seq., provides that

DEP MAY allow a responsible party to remediate a contaminated site. That authority needs to be changed to DEP MUST REQUIRE a responsible party to remediate a contaminated site.

- Similarly, Brownfields legislation N.J.S.A. 58:10B-1 et seq, provides DEP MAY issue a NFA letter to the person responsible for cleaning up a particular site. The requirement to get an NFA letter should be mandatory.
- The undersigned also support the attached document ("ICO public comments final.doc"), separately submitted comments of the Interfaith Community Organization, entitled: 'PUBLIC COMMENTS ON NJDEP'S "WHITE PAPERS"', dated September 2007.

CONCLUSION: Thank you for this opportunity to comment and again we urge the Administration to champion the restoration and strengthening of the State's site remediation program including the will, culture, and exercise of that authority.

Sincerely,

David Pringle, NJ Environmental Federation  
Jeff Tittel, Sierra Club  
Roy Jones, South Jersey Environmental Justice Alliance  
Carla Katz, CWA 1034  
Mike Pisaro, NJ Environmental Lobby  
Jane Nogaki, Coalition Against Toxics (Burlington)  
Ana Baptista, Ironbound Community Corporation (Newark)  
Bob Spiegel, Edison Wetlands Association  
Rick Engler and Valorie Caffee, NJ Work Environment Council  
Kim Gaddy, North Jersey Env'l. Justice Alliance  
Joe Morris, Interfaith Community Organization (Jersey City)

Cc: NJDEP Commissioner Lisa Jackson, Senator Bob Smith, John McKeon, and Linda Greenstein;  
Dr. Judith Shaw (AICP/PP, Manager NJDEP Office of Community Relations)

\* Recent high profile examples of major flaws in the DEP's site remediation programs include but are not limited to:

- Moving contaminated soil from the Ford plant in Edison to sites all over Central Jersey in 2005;
- WR Grace and American Standard in Hamilton, Mercer County;
- Historic dumping in Ringwood by Ford's Mahwah plant;
- Schools planned, built (Camden Early Childhood Development Center), and in some cases torn down (MLK in Trenton) on contaminated sites also in Union City (a state funded Abbott school on a radioactive Manhattan Project site), Gloucester City, and elsewhere;
- Mercury poisoning at Kiddie Kollege Day Care in Gloucester County in 2006 and Hoboken condo's in the 1990's;
- Encap development on landfills in the Meadowlands; and
- a federal district court judge admonishing the NJDEP for failing to protect the people of Jersey City from exposure to chromium.

*Site Remediation  
Reform in New Jersey:  
A Practical View*

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# Executive Summary

The Site Remediation Industry Network (SRIN) is an ad-hoc coalition of twenty companies that conduct remediation at their operating and Brownfield sites in New Jersey. In addition, the Chemistry Council of New Jersey, the New Jersey State Chamber of Commerce, the New Jersey Business and Industry Association, the New Jersey Petroleum Council and the Fuel Merchants Association represent the interests of their members on SRIN.

This booklet was developed by SRIN to communicate our positions and recommendations on the issues discussed during the Legislative Stakeholder meetings convened by NJDEP to address Legislative Reform of New Jersey's Site Remediation Program.

Overall, SRIN believes that the remediation process in New Jersey is overly complex and inefficient. We share the NJDEP's and the public's concerns about the protection of human health and the environment. We believe it is possible to reform the program in a way that makes it more efficient while ensuring protection of human health and the environment.



**This booklet is comprised of five components:**

- 1. Summary of the issues discussed at New Jersey's Legislative Stakeholder Group meetings and SRIN's recommendations;**
- 2. Detailed narrative about the issues and SRIN's positions and recommendations;**
- 3. Basics of the site remediation process in New Jersey;**
- 4. Primer on the role of risk assessment in remediation; and**
- 5. Primer on institutional controls.**

SRIN believes the recommendations in this booklet will result in more timely and efficient cleanups. It is not only possible, but also imperative, that the State of New Jersey reform its Site Remediation Program to ensure protection of public health and the environment by making it more efficient. Related, New Jersey's program must acknowledge and be revised to reflect successes in other states, thus eliminating the current disadvantage for businesses operating in the Garden State. SRIN believes that other State and Federal programs provide learning that should be leveraged. We value the Legislative Stakeholder Process and the opportunity to participate in this important dialogue.

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# Issue and Recommendation Summary

## Issue 1: Addressing Backlogs -- NJ DEP Caseload

NJDEP has expressed concern about caseload, and, its ability to effectively manage the 18,000 sites in their inventory. Possible Solutions Discussed: Creation of a Licensed Site Professional Program (LSP), delegation of homeowner cases to other agencies, and/or use of outside contractors.

### SRIN Recommendations:

*The Legislature should direct NJDEP to:*

1. Divest Site Remediation Program of lower priority cases such as homeowner underground storage tanks (USTs) through expanded reliance on the UST certification program, or expanded Cleanup Star.
2. Encourage the use of outside contractors to work under NJDEP direction in order to eliminate backlogs.

## Issue 2: Prescriptive vs. Performance

Delays and backlogs occur as a result of NJDEP's prescriptive, cumbersome, process-oriented approach to site remediation detailed in the 140 page Technical Requirements for Site Remediation. New Jersey's program offers very little flexibility, as compared to other state programs. All sites are treated the same rather than focusing on site specific evaluations that consider current and future use.

### SRIN Recommendations:

*The Legislature should direct NJDEP to:*

1. Establish performance goals for the program, including review timeframes and case closure. NJDEP should be required to publicly report progress toward their goals so that resource issues and efficiency can be transparent.
2. Require NJDEP to use their technical regulations as "guidance" allowing case specific flexibility. A "one size fits all" approach does not work for many sites and creates inefficiency by requiring work that does not provide associated protection benefit.
3. Require use of a tiered approach similar to those used by other states (for example Massachusetts) that focuses resources and effort on more complicated or sensitive sites.

## Issue 3: Public/Municipal Notification

There has been concern expressed about local government's awareness of the presence of

contamination during local decision-making process and overall public involvement in the cleanup process.

### SRIN Recommendations:

*The Legislature should amend NJSA 13:1K to:*

1. Require notice to a municipality by the property owner or developer of any conversion of a former industrial or commercial site to residential, school, or other sensitive use.
2. Require notification that contamination has migrated off-site from within 200 feet of the site boundary to within 200 feet of an area of concern (AOC). Further, the law should direct NJDEP to modify their proposed regulation that would require notification of off-site groundwater contamination, because it would be redundant with existing requirements to notify property owners and groundwater users as part of the establishment of a Classification Exception Area (CEA).
3. Require notice after sufficient information is collected to be able to communicate effectively (i.e., after the remedial investigation) vs. the site investigation as currently proposed by NJDEP, unless there is a known immediate concern.

## Issue 4: Remedy Selection

There has been discussion about requiring "permanent" remedies. Permanent remedies are those that treat or remove contamination to the unrestricted use cleanup criteria. In other words, permanent remedies do not contain or control contamination; therefore, the property does not require deed restrictions. Some have argued that NJDEP does not currently have authority to select remedies. On this latter point, current law requires the responsible party to propose a remedy to NJDEP. NJDEP has broad authority to accept the proposed remedy, or disapprove of the proposed remedy.

### SRIN Recommendations:

*The Legislature should direct NJDEP to:*

1. Use its cleanup criteria not as "standards," but rather as screening criteria to determine whether additional investigation or remediation is required (as is done in other States and USEPA).
2. Allow compliance averaging, and, consideration of alternate points of compliance.
3. Allow parties performing the remediation to elect either to use the cleanup criteria as the cleanup "standard" for their site, to develop site-specific cleanup standards, or to develop site-specific criteria based on USEPA guidance.<sup>1</sup>

1. NJSA 58:108 currently allows site specific risk assessment, but in practice, NJDEP does not review, or support this process. Further, NJSA 58:109 should be amended simply require that site specific risk assessments be consistent with USEPA guidance.

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4. Consider the use or vision of a property (i.e., schools, homes, and operating industrial sites) when reviewing investigation and cleanup plans.

SRIN does not believe that a requirement for permanent remedies at all sites is appropriate. Technology limits the ability to permanently remediate groundwater at many sites and it may actually be a detriment to the environment (i.e., more truck traffic resulting in more particulate emissions, inconsistent with recent state legislation and policy). Rather, the NJDEP should focus on site specific considerations, consider the current and future use of a site, and, use risk assessment to make site-specific decisions about what will be protective.

### Issue 5: Acute Exposure / Hot Spot Removal

Further below, SRIN proposes a solution to address concerns about the long-term maintenance of sites requiring deed restrictions. Despite these efforts, there may be instances in which an engineering control fails. SRIN agrees that acute (short-term) risks posed by failure of an engineering control, if any should be addressed during remedy selection. If NJDEP feels there are acutely hazardous materials ("hot spots") or site conditions that require an alternative approach, the Agency currently has the authority to use site-specific risk assessment to demonstrate that removal is warranted.

#### SRIN Recommendations:

*The Legislature could consider:*

1. If necessary, require NJDEP to use the USEPA's science-based "principle threat waste" concept in order to address acute/hot spot issues. NJDEP should not be given authority to use any arbitrary factor (i.e., 10 times a cleanup criteria) to define a hot spot.

### Issue 6: Long Term Stewardship of Remedial Actions

As discussed above, it is not always technologically possible, nor appropriate, to remove all contamination. When NJDEP determines that it is protective, NJDEP will allow contamination to remain at a site above the unrestricted cleanup criteria. An example would be when contamination may exist 20 feet below ground, below a building, or under a paved surface. This practice, which uses institutional and engineering controls, is safe so long as appropriate notice is provided to current and future users of the site, local government, and NJDEP.

#### SRIN Recommendations:

*The Legislature could consider:*

1. Develop a permit-by-rule or registration program for sites where contamination remains in soil or groundwater above the unrestricted cleanup standard (Deed Restrictions, Natural Attenuation for Groundwater). In addition, the Legislature should consider adoption of the Uniform

Environmental Covenants Act (UECA) that has become law in many other states, including PA and DE.

2. Require information regarding permits to be made available on the web.
3. Require that the permit be transferred to the new property owner when sites are sold (similar to other permits).
4. Require that the permit holder is solely responsible for compliance with the permit, and, any associated monitoring and reporting to NJDEP.
5. Require that a person proposing to change/modify site use and/or restrictions on a previously remediated site be responsible for conducting any additional cleanup.

### Other Issues: Environmental Insurance, Cumulative Exposure, Historic Pesticides and Dry Cleaner Remediation Program

The regulated community is opposed to any environmental insurance program that is implemented purely to act as a disincentive to utilizing non-permanent remedies. In addition, the regulated community does not feel it is necessary to require environmental insurance to ensure long term protectiveness of sites with engineering and institutional controls if: 1) the Legislature establishes a permit program (as recommended above) and; 2) clearly articulates that the current property owner is responsible for compliance with any restrictions.

Cumulative exposure, historic pesticides and the dry cleaner remediation program were discussed only briefly and late in the Stakeholder process. SRIN will reserve comment until more is learned about these programs.

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# Information Supporting Recommendations

## Introduction

This booklet was developed by SRIN to communicate our positions and recommendations on several issues that have been discussed within the context of Legislative Reform of New Jersey's Site Remediation Program.

This section describes the issues discussed at New Jersey's Legislative Stakeholder Group meetings and provides detailed narrative supporting SRIN's positions and recommendations. The six issues discussed in this section are:

1. Addressing Backlogs -- NJDEP Caseload;
2. Prescriptive vs. Performance;
3. Public/Municipal Notification;
4. Remedy Selection;
5. Acute Exposure/Hot Spots; and
6. Long-Term Stewardship of Remedial Actions.

Overall, SRIN believes that the remediation process in New Jersey is overly complex and inefficient. We share the public's concerns for protection of human health and the environment. We believe that it is possible to reform the program in a way that makes it more efficient while ensuring protection of human health and the environment.

## Background

During the course of 2006 and 2007, numerous news media accounts chronicling issues related to contaminated site management in places such as Edison, Trenton, Mahwah and Franklin. Many of these accounts expressed concern over the management of site remediation issues in New Jersey.

In contrast to the views expressed in the media by several environmental groups active in New Jersey, SRIN members' experience is that, as a general matter, the NJDEP's remediation program is indeed more stringent and provides more oversight than most other state programs. A survey of retail gasoline station sites conducted by the petroleum industry demonstrates that the costs of cleanup in New Jersey are greater than the costs in nearly every other state, while the closure (completion) rate is noticeably lower. These facts indicate New Jersey's more prescriptive requirements are more stringent than other states, increase costs, result in sites that remain under oversight much longer without closure. Overall, this suggests inefficiencies in NJDEP's site remediation process.

While a small number of sites have presented issues deserving of greater scrutiny, these are but a small percentage of the 18,000 known contaminated sites. The specific cases presented in the media should be studied closely to understand the specific root causes of the issues.

Overall, however, these are an extremely small number of sites relative to the entire remediation caseload. SRIN believes that improvements can be made, but, that the site remediation program overall is protective, and tends to retain too many sites rather than too few. It is these inefficiencies that must be addressed in order to reduce

NJDEP's caseload burden and remediate more sites sooner.

## Federal Standards and Methods

Methods for cleanup of contaminated sites have been developed in the U.S. over the past 25 years, and there are a variety of techniques used to investigate and remediate sites in a manner that is protective of public health and the environment. These methods are widely accepted and used by the U.S. Environmental Protection Agency (U.S. EPA) and numerous states.

The State of New Jersey has opted for a different approach. The New Jersey approach may appear simpler; however, the limited number of options used by the NJDEP results in a more complicated and disruptive remediation process. The federal approach and how the State's approach differs are described to support several of our recommendations for reform of New Jersey's site remediation program.

The primers attached to this booklet on the site remediation process in New Jersey, the role of risk assessment in remediation, and institutional controls are intended to provide definitions and explain terminology.

### **Example: New Jersey's Soil Cleanup Standards differ from USEPA Process**

*The federal Superfund program and several USEPA Regions (3, 6 and 9) have developed soil screening levels for chemicals and metals as described in the 1990 National Contingency Plan. These are low values with many conservative assumptions built in. They are used for the initial screening of site investigation results and do not represent final soil cleanup values. If there are no results greater than these low screening levels, then no further evaluation is needed. If site results exceed screening levels, this indicates that further evaluation is warranted, not necessarily a need for remedial action.*

*In the USEPA process, a site-specific risk assessment is used to further evaluate any results that exceed screening levels. A risk management decision is then made regarding whether remedial action is needed, considering the results of the human health and ecological risk assessments, technical feasibility, community concerns, economics, harm potentially caused by a remedial action and other factors.*

*NJDEP has developed soil cleanup criteria and proposed soil remediation standards using similar approaches to those used to develop USEPA screening levels. However, there are significant differences in how NJDEP applies the criteria. NJDEP considers any area with a contaminant over a generic numerical criterion equally in requiring remediation. In addition, NJDEP uses narrative standards to dictate cleanup requirements, such as free and residual product; these standards are not in any way based on risk to human health or the environment.*

*The most significant difference between the USEPA soil screening levels and the NJDEP soil cleanup criteria/proposed standards is that NJDEP utilizes its values as de facto cleanup values regardless of whether the contamination actually poses a risk to human health or the environment in its location and regardless of whether complete exposure pathways exist for it to cause an impact.*

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# Issues 1 and 2: Addressing Backlogs -- NJDEP Caseload; and Prescriptive vs. Performance

## Background

NJDEP has expressed concern about caseload, and, their ability to manage the 18,000 sites in their inventory. Solutions discussed in the Legislative Stakeholder Meeting have included: creation of a Licensed Site Professional Program (LSP), similar to Massachusetts' LSP program; delegation of homeowner underground storage tanks to local governments or to LSPs; or some combination of the two.

The caseload problem should not be attributed solely to a lack of resources, but rather the fundamental design of the remediation program in New Jersey should be evaluated as well. The NJDEP has developed a very "process" oriented approach to remediation that is lengthy and cumbersome. For example, the New Jersey Technical Requirements for Site Remediation ("Tech Regs") are over 140 pages in length.

The same requirements are applied to every site. New Jersey's site investigation approach has caused its remedial program to become overwhelmed by the need to evaluate each area of each site where a cleanup standard is exceeded. Sites languish in the remedial investigation stage because additional data collection is required again and again, even when there is enough information to allow for action.

Based on a benchmark conducted by a SRIN member, NJDEP's UST caseload is actually lower than most other states. As a result, one would expect that despite workload, NJDEP's cleanup closure rate would be higher than other states. However, their case closure rates are also among the lowest in the nation. This indicates that the issue is not solely one of resources; there are program inefficiencies that must also be addressed. Adding resources will not solve the problems associated with the prescriptive and inflexible application of the Technical Regulations to each and every site in a manner that is inconsistent with USEPA and many other states.

SRIN agrees that there is also a resource issue. NJDEP needs to be able to focus its resources on those sites that present the highest risks. This means managing the caseload of already overburdened NJDEP staff by delegating cleanup oversight of lower risk sites to either certified consultants or other state/local agencies and expeditiously closing sites that do not pose a significant risk to human health or the environment.

New Jersey's approach does not provide the responsible party or the NJDEP with the ability to prioritize areas and sites posing the greatest potential risk to health or the environment. Instead, New Jersey's approach often causes limited resources, including time, to focus on marginally contaminated areas that pose little to no real risk and shifts resources away from more serious problems.

## Position

SRIN believes that it is imperative to address process inefficiency, at the same time as workload. In order to address

program inefficiencies, NJDEP must move from a process-oriented approach towards a performance-driven approach. A performance-based program sets clear programmatic goals; establishes clear metrics of success; designs a program to achieve those metrics; measures progress against those metrics; and reports on progress and opportunities for improvement in a transparent manner. A performance-based program protects human health and the environment, safely redevelops sites for beneficial use, and optimizes use of resources of both the public and private sectors.

To address both the resource and programmatic issues, the Site Remediation Program needs to be changed to enable a continuous risk-based prioritization of remediation efforts, both across the known contaminated sites list and at different areas within a site. This would involve a site-specific review of the potential risks posed under current or anticipated future land uses, the potential remedial alternatives to address those risks, and any work that has already been conducted at the site to reduce risks. The result of that site-specific review would be to focus cleanup efforts on the most serious and immediate risks first.

Since all remediation sites are unique, it is not appropriate to address all sites exactly the same or each particular site through a prescriptive "cookie cutter" approach. By doing so, there is more possibility for excessive work at certain sites with no corresponding benefit to human health and the environment, and, potential problems at other sites may be missed. A more efficient program that focuses on risks involved and rewards the achievement of intermediate milestones would result in the protection of health and the environment at sites sooner.

## Recommendations

*SRIN supports legislation that:*

1. Divests SRP of lower priority cases such as homeowner underground storage tanks (USTs) through expanded reliance on the UST certification program, or expanded Cleanup Star.
2. Encourage the use of outside contractors to work under NJDEP direction in order to eliminate backlogs.
3. Establish performance goals for the program, including review timeframes and case closure. NJDEP should be required to publicly report progress toward their goals so that resource issues and efficiency can be transparent.
4. Require NJDEP to use their technical regulations as "guidance" allowing case specific flexibility. A "one size fits all" approach does not work for many sites and creates inefficiency by requiring work that does not provide associated protection benefit.
5. Require use of a tiered approach similar to those used by other states (for example Massachusetts) that focuses resources and effort on more complicated or sensitive sites.

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# Issue 3: Public/Municipal Notification

## Background

SRIN supports meaningful public communication as a key component of the Site Remediation Program (SRP), and we support the underlying concepts which were the basis for both the most recent notification law (P.L. 2006 c.65) and the Proposed Rule. Moreover, under the current SRP, responsible parties provide communication measures tailored to meet the diverse nature of sites and the communities within which they are located. Our experience has shown that remediation projects proceed more efficiently – and with far more benefit to communities and responsible parties – when the public understands their scope, nature and impact.

However, we are concerned that the Proposed Rule will adversely impact the site remediation program as a whole. The Proposed Rule is far too specific to be flexible, and it creates numerous disincentives toward remediation. A “one size fits all” approach will not work for every remediation site. Incentives, not disincentives, are the best tool the State can provide to encourage more effective cleanups.

In the Proposed Rule, the NJDEP has created unnecessary and costly redundancies aimed at providing notice, rather than simply focusing on the goals, principles, and, key components of a successful communication program. By creating these costly and unnecessary redundancies, the NJDEP has failed to contemplate the impact on those “responsible” parties who abide by the law, provide notification and work with the community to bring contaminated sites back to useful and productive life.

As a principle, we believe that communication programs should be focused on property owners, government officials and other stakeholders impacted by contamination or by remediation response actions. Moreover, communication programs should provide meaningful and accurate information to affected parties in a simple and easy to read format. The rule should be restructured to focus on goals, principles, and, key components of successful communication programs rather than providing significant detail regarding the remediation process. For example, the information required in the fact sheet is extremely detailed and specific, which directly contravenes the stated purpose of the rule – to communicate simply and clearly.

Furthermore, notifying property owners and tenants within 200 feet of the site boundary as opposed to the proximity of the contamination could lead to unnecessary angst for those who may be close to the site, but may be nowhere near the contamination. Many industrial or commercial facilities in New Jersey encompass hundreds of acres in a contiguous area. The NJDEP should consider a different approach toward large sites with contamination that is a significant distance from any residences, buildings, parks, or sensitive receptors.

In addition, SRIN is concerned that in many circumstances notification of nearby property owners and tenants at the end of the site investigation phase is premature. At the end of the site investigation phase, there is often insufficient information available to help communicate whether a

property has been impacted. This premature notice will serve only to create unnecessary public confusion and concern.

## Recommendations

1. The Legislature should amend NJSA 13:1k to require notification that contamination has migrated off-site from within 200 feet of the site boundary to within 200 feet of an area of concern (AOC). The Proposed Rule should not include notification requirements for groundwater contamination that has migrated off-site, because it would be redundant with existing requirements to notify property owners and groundwater users as part of the establishment of a Classification Exception Area (CEA). We believe that these revisions will make the requirements consistent with the intent of the enabling legislation (4.1-4.2);
2. We recommend that official public notification be required only after a remedial investigation has been completed by the responsible party and approved by the NJDEP, or when a responsible party has information to indicate that contamination has migrated off-site (5.1-5.3);
3. Amends N.J.S.A. 13:1K to require that notice be provided to a municipality of any conversion of a former industrial site to residential, school, child care or other sensitive uses.

# Issues 4 and 5: Remedy Selection and Acute Exposure/ Hot Spot Removal

## Background

Remedies are generally thought of in terms of "permanent" or "non-permanent". "Permanent" remedies refer to sites where the contamination is permanently treated or removed such that the site would be as it was prior to the presence of contaminants. Permanent remedies clean a site up to the most stringent standards: an unrestricted use "No Further Action" (NFA) letter is obtained from NJDEP, indicating that there are no restrictions on the future use of the property. "Non-permanent" remedies are also required to be protective of human health and the environment, but generally allow some contamination to remain at the site below a restricted use standard, or contained to prevent exposure. Restricted use NFAs effectively use institutional or engineering controls to enable a site to be used productively, while ensuring that it is not a continuing source of contamination or negatively impacting human health or the environment.

Some have advocated that New Jersey should require "permanent" remedies at all sites. The reality is that there are technology and resource limitations that prevent complete removal or treatment of contamination at the vast majority of sites. It is neither practicable nor appropriate from a risk standpoint to perform complete removal at many sites, especially large or complex ones. In most cases, the application of an unrestricted use or "permanent" remedy includes the transportation of significant volumes of contamination from one location to another (out-of-state). This results in more diesel truck emissions, more energy consumption, and even less already-limited landfill space, which, overall, may actually create more harm, rather than greater protection, of public health and the environment.

The federal government has recognized that complete removal/treatment is neither possible nor necessary at the majority of remediation sites. Risk assessment is a tool used by U.S. EPA and other states to focus limited resources on the most important issues with respect to protecting human health and the environment.

During the remedy selection process, USEPA evaluates the results of the risk assessment and targets any remedial action to areas that pose the greatest risk to human health and the environment. Other impacted areas are also evaluated and the need for remediation is determined.

USEPA uses several concepts to ensure that remedies not only reduce risk to an acceptable level but also focus cleanup on the areas of greatest potential risk, both within a site and across sites. These concepts, which include "points of compliance"<sup>1</sup>, "stabilization of migration of groundwater"<sup>2</sup> and "principal threat waste"<sup>3</sup>, are already

<sup>1</sup> "As a general definition, the point of compliance for groundwater is where a facility should monitor groundwater quality and/or achieve specified cleanup levels to meet facility-specific goals. EPA recommends consideration of the following factors when developing a facility-specific groundwater point of compliance: proximity of sources of contamination; technical practicability of achieving particular cleanup levels; vulnerability of the groundwater and its possible uses; and exposure and likelihood of exposure. U.S. EPA, Handbook of Groundwater Protection and Cleanup Policies for RCRA Corrective Action, EPA-30-R-04-030, April 2004.

<sup>2</sup> "Stabilization in this context refers to taking whatever action is necessary and practicable to address actual exposures and to prevent the further spread of contamination (e.g., ensuring that a contaminant groundwater plume does not continue to get larger or impact adjacent surface water bodies). See above reference for more information.

<sup>3</sup> U.S. EPA, A Guide to Principal Threat and Low Level Threat Wastes, OSWER Directive 9/80-3-06FS, November 1991.

in place at the federal corrective action program and in many states.

**Source material** is defined by USEPA as contaminated material that act as a reservoir for migration of contamination to ground water, to surface water, to air, or acts as a source for direct exposure. Groundwater, surface water, and residuals resulting from treatment of site materials are generally not considered to be source materials.

**Principal threat waste** is considered by USEPA to be highly toxic or highly mobile source material that generally cannot be contained in a reliable manner and/or would present a significant risk to human health or the environment should exposure occur, considering current and realistic future land use.

While principal threat wastes are treated or removed wherever practicable under current federal guidance, when treatment is not technologically feasible, the site is too complex or the risk of removing the materials outweighs the risk of leaving the materials in place, USEPA recognizes it may be more appropriate to contain these wastes. Other source materials that are considered low level threat waste are generally managed with engineering controls, if necessary. Where it makes sense, a combination of institutional and engineering controls (such as containment), treatment and removal are allowed for remedial action at a site.

In contrast to the approach used by USEPA and many states, where current and anticipated future land and water use are factored into the risk assessment, land and water use are not incorporated into New Jersey's remediation process. NJDEP's "residential" and "nonresidential" soil cleanup criteria are based on assumptions that do not adequately consider the actual and potential human and ecological receptors and exposures at a site. Most, if not all, municipalities in New Jersey already restrict installation of shallow wells for potable use due to potential contamination from septic systems and surface runoff. In some areas, salinity prevents groundwater from serving as drinking water. Although legislation and regulations allow for different groundwater classifications in the state, in practice, NJDEP seems to expect virtually all groundwater to be cleaned up to drinking water standards regardless of its current or proposed use.

Lastly, responsible parties that are not the current site owners may be held to potentially greater cleanup requirements, as the NJDEP requires that the current property owner approve the proposed remedial action regardless of the risk to human health and or the environment.

## Position

SRIN does not believe that a requirement for permanent remedies is appropriate. Rather, the NJDEP should focus on site specific considerations, consider the current and future use of a site, and, use risk assessment to make site-specific decisions about what will be protective. In addition, technology limits the ability to permanently remediate many sites. And, permanent remedies (especially removal and off

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site disposal) may result in additional adverse environmental and health consequences.

Changes in the existing administrative procedures for New Jersey site investigation and remediation will allow for timely and less disruptive remediation of contaminated sites. In order to ensure that remedial actions that are "non-permanent" will be protective of humans and the environment, changes in laws regarding restrictions on land use are also proposed below.

New Jersey does not currently incorporate the above USEPA concepts into its site remediation program. SRIN believes that NJDEP has a desire to address areas of elevated contaminants ("hot spots") where there is a potential for acute exposure should a "cap" fail. The principal threat waste concept established by USEPA significantly reduces overall site risks by focusing cleanup efforts on areas of contamination that pose significant threats to humans or the environment. SRIN recommends that the principal threat waste concept be used by NJDEP to address their "hot spot" concerns. The use of an arbitrary multiplication factor (such as 100 times the soil cleanup criteria as has been suggested by some at NJDEP) is neither supported by science nor is it based on actual risk to human health or the environment. If NJDEP feels there are acutely hazardous materials ("hot spots") or site conditions that require an alternative approach, the Agency currently has the authority to use site-specific risk assessment to demonstrate that removal is warranted.

In New Jersey, the incorporation of the above USEPA concepts into a risk-based remediation program would provide NJDEP with the flexibility to approve more appropriate remedial actions, make the cleanup program more predictable, rank sites based on risk, assure protection of human health and the environment at sites sooner, and encourage owners of vacant sites, and developers willing to purchase vacant sites, to get such sites into the cleanup program. Furthermore, such modification of the New Jersey remediation regulations would provide an opportunity for NJDEP to establish, monitor and demonstrate incremental progress towards ultimate cleanup objectives. The elimination of unacceptable human exposures to contamination and the stabilization of the migration of contaminated groundwater are environmental indicators used at the federal level to measure intermediate success of the remediation program. Thus NJDEP, government officials and responsible parties would be better able to inform and meet stakeholder demands about environmental remediation progress in the state.

## Recommendations

*The Legislature should direct NJDEP to:*

1. Use their cleanup criteria not as "standards," but as screening criteria to determine whether additional investigation or remediation is required.
2. Allow compliance averaging, and, consideration of alternate points of compliance.
3. Allow parties performing the remediation to elect either to use the cleanup criteria as the cleanup "standard" for their site, to develop site-specific cleanup standards,

or to perform a site-specific risk assessment that will be reviewed by NJDEP, consistent with USEPA guidance.

4. Consider the use or vision of a property (i.e., schools, homes, operating industrial sites) when reviewing investigation and cleanup plans.

5. If necessary, consider USEPA's principle threat waste concept to be protective

# Issue 6: Long Term Stewardship of Remedial Actions

## Background

As discussed above, it is not always technologically possible, nor appropriate to remove all contamination. When NJDEP determines that it is protective, NJDEP will allow contamination to remain at a site above the unrestricted cleanup criteria. An example would be when contamination may exist 20 feet below ground, below a building, or under a paved surface. This practice is safe so long as appropriate notice is provided to current and future users of the site, local government, and NJDEP.

These legal and physical mechanisms are known as institutional and engineering controls<sup>2</sup>, respectively. Institutional and engineering controls limit potential future human and environmental exposures and are critical to land reuse and redevelopment at Brownfield sites and other contaminated properties.

SRIN shares the NJDEP and public's concerns regarding the long-term stewardship of remediation sites and maintenance of institutional and engineering controls. Current NJDEP regulations already contain extensive requirements to ensure the effective maintenance and long-term monitoring of engineering and institutional controls. These requirements include the filing of deed notices and biennial certification to NJDEP that the controls remain effective. At the vast majority of sites, these requirements are working successfully to ensure the protection of public health and the environment.

The ultimate remedial decision for the property is not dictated by the responsible party if it is not the current property owner. Current regulations state that an engineering and/or institutional control cannot be placed on a property without both the property owner's consent and notification to and approval by NJDEP.

## Position

SRIN believes that long-term stewardship of remedial actions is important to ensure that environmental and health protections are maintained over time. However, we believe that the vast majority of sites with engineering and institutional controls are currently managed appropriately.

SRIN agrees that it is necessary to strengthen the current program on long-term maintenance of institutional controls to provide greater accountability, responsibility, clarity and transparency. It is in all parties' interests to have an effective long-term stewardship program that has the capability to track, record, and enforce engineering, land and resource use restrictions. An effective program would be efficient with a reasonable number of streamlined requirements.

SRIN supports legislative change to clarify that the property owner is exclusively responsible for maintaining institutional controls, and any required engineering controls. The property owner would be NJDEP's point of contact regarding the maintenance of institutional controls.

## SRIN supports adoption of the Uniform Environmental

Covenants Act (UECA) that would allow the State to enforce land use restrictions and assure that proposed changes in land use are properly considered. SRIN believes that UECA offers the best solution to the problems faced by the public, regulators, and responsible parties around the long-term viability of institutional controls and land use restrictions. UECA is enforceable, and gives the regulatory agency the right to enforce restrictions on successive owners of a property in perpetuity. In addition, UECA should overcome any common law restrictions to the long-term application of land use restrictions. To date, 16 states, District of Columbia and U.S. Virgin Islands have adopted UECA, and USEPA has written a letter supporting UECA. More than 20 states are planning to introduce UECA in their legislatures in 2007.<sup>3</sup> We view this as a very important law that will help the State in land reuse and redevelopment at Brownfield sites and other contaminated properties.

Alternatively, a permit-by-rule or registration program could provide a mechanism for tracking of institutional and engineering controls at the state level. The registration could run with the title of any property cleaned up to restricted use and clearly outline the responsibility of the current land owner to comply with the operation, maintenance and reporting of any institutional and/or engineering controls. There are a number of state and local permit tracking systems that are being used in places such as Florida, Arizona, Rochester, New York and Oakland, California.

## Recommendations

*The Legislature should direct NJDEP to:*

6. Develop a permit-by-rule or registration program for sites where contamination is left in soil or groundwater above the unrestricted cleanup standard (Deed Restrictions, Natural Attenuation for Groundwater). In addition, the Legislature should consider adoption of the Uniform Environmental Covenants Act (UECA) that has become law in many other states, including PA and DE.
7. Require information regarding permits to be made available on the web.
8. Require that the permit be transferred to the new property owner when sites are sold (similar to other permits).
9. Require that the permit holder is solely responsible for compliance with the permit, and, any associated monitoring and reporting to NJDEP.
10. Require that a person proposing to change/modify site use and/or restrictions on a previously remediated site be responsible for conducting any additional cleanup.

<sup>2</sup> UECA adopts from National Conference of Commissioners on Uniform State Laws (NCCUSL) website: [www.nccusl.org](http://www.nccusl.org). More information on UECA can be found at: <http://www.epa.gov/ueca/>

<sup>3</sup> <http://www.epa.gov/ueca/> SRIN can provide a copy of USEPA letter to NCCUSL supporting UECA. U.S. EPA, National RCRA Corrective Action Training Curriculum, U.S. EPA Region 4/TechLaw, "Institutional Controls" presentation can be found at: <http://www.epa.gov/correctiveaction/curriculum/download/in-cont.pdf>

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# Attachment 1: Site Remediation Process in New Jersey

## Site Remediation

Site remediation in New Jersey is driven by a number of laws and rules. Regardless of the governing law, however, all remediation activities, whether under the Underground Storage Tank Law, Industrial Site Recovery Act (ISRA), or Spill Compensation and Control Act (Spill Act), must be performed according to the *Technical Requirements for Site Remediation* (Tech Regs). The *Procedures for Oversight of the Remediation of Contaminated Sites* (Oversight Rules) set forth the rules governing how and when NJDEP oversight will be provided. This fact sheet provides a brief overview of the site remediation process in New Jersey.

### What is remediation?

**Remediation** is the process of identifying contamination, evaluating potential impacts associated with that contamination, and implementing a remedy to mitigate those impacts. Contamination may be due to spills or releases to the environment and generally refers to the presence of a chemical in environmental media (such as soil or groundwater) at levels above a screening level. The **screening level** is usually based on a conservative estimate of human health or ecological effects, unless background levels seen in the absence of contamination are higher.

### What are the "Tech Regs"?

The *Technical Requirements for Site Remediation* (Tech Regs), N.J.A.C. 7:26E, set forth a process that must be followed in order to reach completion of remediation through issuance of a "No Further Action" (NFA) letter. There are two types of NFAs – restricted and unrestricted.

**Restricted use** NFAs require ongoing monitoring of site conditions to ensure, for example, that "caps" (that prohibit direct contact with soil contamination at depth) have not been impacted and remain effective.

**Unrestricted use** NFAs are issued when there is no contamination at a site, or where contamination has been treated or removed to the most stringent criteria.

### What is New Jersey's site remediation process?

The site remediation process in New Jersey essentially has four steps: the preliminary assessment, site investigation, remedial investigation, and remedial action.

The **preliminary assessment** involves a historic review of the area to be remediated, the processes conducted, substances used and operating history.

The **site investigation** builds on the preliminary assessment and involves limited sampling of soils, groundwater, etc. to determine if any environmental media have been impacted at levels that exceed the applicable cleanup criteria (non-regulatory criteria used by NJDEP to define when a site is "contaminated"). If there are no exceedences of the applicable criteria, then NJDEP issues an NFA. If the criteria are exceeded, a remedial investigation is required.

The purpose of a **remedial investigation** is to do more extensive sampling to determine the nature and extent of contamination. This process may be iterative depending on the complexity of the site.

Once the nature and extent of the contamination is defined, the person conducting the cleanup will propose a remedial action to the NJDEP. The **remedial action** proposed must be protective of human health and the environment and meet the criteria outlined in the Tech Regs.

If the NJDEP approves the remedial action, field work to implement the remedy begins. After completion of the remedy and submittal of all appropriate reports to the agency, an NFA may be issued by NJDEP. This could take years depending on site conditions.

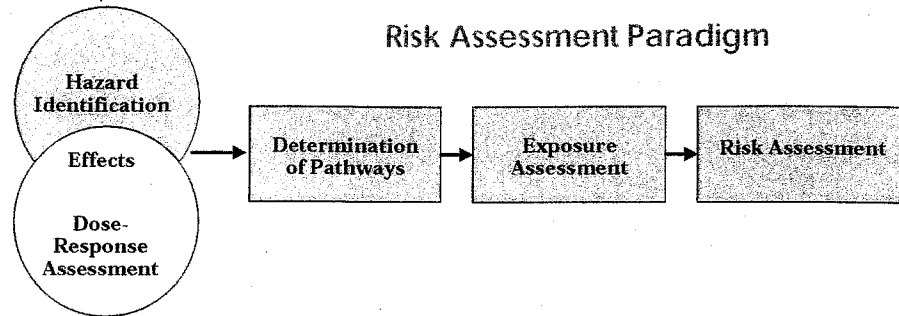
### How does NJDEP have oversight over site remediation?

NJDEP oversight is required throughout all phases of site remediation, including review of all workplans (for example, what are the plans for conducting a remedial investigation) as well as all reports documenting the findings of any investigations. NJDEP often reviews workplans and reports and requests additional information or work before it permits moving to the next step.

# Attachment 2: Role of Risk Assessment in Remediation

## Risk Assessment

Human health and ecological risk assessments have become fundamental tools to numerous environmental protection programs at state, federal and international levels. The U.S. Environmental Protection Agency and many states use risk assessment as one tool to help determine the amount of remediation work, if any, that is needed at a contaminated site. However, rather than allowing for the use of risk assessment tailored to a particular site, New Jersey's current program tends to use an approach that does not consider the real risk, likelihood of actual exposure, or the potential harm of taking remedial action. This fact sheet provides a brief overview of risk assessment.



### What is risk assessment?

**Risk assessment** is a scientific method to determine whether or not harmful effects may be caused by environmental contamination. In order to make this determination, the potential human **exposures** need to be identified and a dosage rate is calculated. This number is then compared to the available information of what harmful effects a chemical might have at different dosage levels. The harmful effects are determined by studies in humans or experimental animals.

### How are the decisions made based on risk assessment?

U.S. EPA and many states use risk assessment to decide whether the level of environmental contaminants at a remediation site is "safe" or "protective". Risk assessment can also be used to prioritize sites, or areas within a site, for concern or action. These activities are called "**Risk Management**." Other inputs into risk management decisions include availability of technical solutions, stakeholder concerns, costs and benefits, regulatory and legal requirements, practicability/feasibility, equity and political issues.

### What is the definition of risk?

$$\text{Risk} = \text{Hazard} \times \text{Exposure}$$

For a risk to be present there must be both hazard and exposure. One effective way to manage risk is to manage exposure, for instance, through engineering or institutional controls.

### What are the elements of a risk assessment?

Risk assessments assemble information into three steps:

- **Hazard Identification** identifies the inherent dangerous properties of a chemical such as toxicity.
- **Dose-Response Assessment** establishes whether effects will occur at certain doses and the magnitude of those effects.
- **Exposure Assessment** documents the degree to which a living organism comes into contact with a hazard.

The first two elements do not change from one site to another. However, the third element, exposure assessment is very different at different sites. When evaluating risk, risk assessors speak in term of "exposure pathways." The determination of exposure pathways is crucial to the risk assessment process. As with any scientific method, it is extremely important to have good information to use for the inputs in risk assessment.

**Exposure pathways** have four components:

- Chemical source
- Transport medium (such as water or air)
- Receptor population (such as humans, animals or plants)
- Exposure route (such as ingestion)
- Likelihood of exposure and estimated potential dose of the hazard

All of the above components must be present for a **complete exposure pathway** to exist. In order to truly understand the risks that hazards may present at a particular site, understanding the exposure pathways is a very important first step in the risk assessment process.

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How difficult is it to perform a risk assessment?

The methods used for risk assessment have now been in place for almost 20 years. There are a large number of professionals trained to perform high-quality risk assessment with many computerized tools at their disposal. Therefore, a risk assessment can readily be performed at each site that will provide for protection of the public's welfare.

**Likelihood of exposure** is an important factor in risk assessment. It allows for judgments regarding how frequently and to what extent a person could be exposed to the following:

- Soils that are at depth
- Soils that are contained
- Groundwater that is not part of any drinking water system

### ***Example: New Jersey's Risk Assessment Approach Differs from USEPA***

*New Jersey's approach to evaluate the results of the risk assessment varies from the techniques used by USEPA and many other states. The National Contingency Plan states that acceptable cancer risks at sites can vary by two orders of magnitude (from one-in-ten thousand to one-in-one million) depending upon the likelihood of individual exposures, the technical feasibility to achieve that level, and the disruption of ecosystems for the remediation process. NJDEP insists upon a one-in-one million cancer risk level regardless these factors. Records of Decision for USEPA-led sites indicate that the federal agency utilizes the full risk range. Because USEPA considers site specific characteristics and develops site-specific risk assessments, soil cleanup standards for a chemical/metal can vary from site to site.*

## Attachment 3: Institutional and Engineering Controls

### Institutional and Engineering Controls

For purposes of site remediation, contaminants can either be removed or, if removal is not practical, institutional and engineering controls are often used. There are trade-offs between complete removal of contamination and these other means of preventing exposure to hazards. The benefits of using institutional and engineering controls are a lesser likelihood that contamination will redistribute over wider area, the shorter period of time to implement the remedy and, in some cases, these methods may be the only possible alternative. Institutional and engineering controls are often used together.

#### What are Institutional Controls?

**Institutional controls** are legal restrictions on a property intended to prevent exposure to contamination left onsite after a property has been cleaned up, such as deed notices that assure new owners are on notice and preclude certain land use (for example, as a residence or school) or water use (for example, drinking water or swimming) in an area of known contamination.

#### What are Engineering Controls?

**Engineering controls** are caps, signs, fences, groundwater containment systems and other physical mechanisms that contain or stabilize contamination or ensure the absence of a potential for human exposure.

### Institutional and Engineering Controls

Institutional and engineering controls are widely used in settings other than site remediation to protect people from chemicals that could be hazardous if they received significant exposures. Here are several examples:

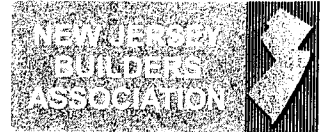
- A gasoline tank in an automobile is an engineering control to prevent a fire hazard and to protect people from exposures to gasoline.
- There are legal restrictions concerning the disposal of heating oil tanks when they are replaced. This is an institutional control.
- Radon control systems are engineering controls that prevent significant exposure of humans to radon beneath their homes.

Legal restrictions and containment technologies, which are in effect institutional engineering controls, are widely used for pharmaceuticals, household cleaning products, lawn care products and so forth.

37x

**To Reach the Site Remediation Industry Network (SRIN)**  
**Contact- Tony Russo @ (609)-392-4214**

35x



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BUILDERS LEAGUE OF  
SOUTH JERSEY

BUILDERS  
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OF NEW JERSEY

FOUNDATION FOR HOUSING

**TO: MEMBERS OF THE SENATE ENVIRONMENT COMMITTEE,  
MEMBERS OF THE ASSEMBLY ENVIRONMENT & SOLID  
WASTE COMMITTEE**

**FROM: BARRY S. SOLONDZ, PRESIDENT**

**DATE: APRIL 15, 2008**

**RE: *Proposed Reforms to Site Remediation Program***

The New Jersey Builders Association appreciates this opportunity to express concerns with the Site Remediation Program (SRP). We commend the Department of Environmental Protection for expending significant time and effort in convening the Legislative Stakeholder Process. We would also like to commend Chairmen Smith and McKeon for convening this joint hearing to address critical concerns with site remediation in New Jersey. The Association has been actively engaged with the Stakeholder Process and provided commentary on the draft "White Papers." Today, we highlight some salient points.

Overall, the need for further discussion remains paramount. The remediation of Brownfield sites in New Jersey can be and has been a highlight of how the private sector and our government can work together, in these cases, to address the legacy of our industrial past and safely return those sites to constructive use. We are proud that our membership has had a critical role in those successes. The redevelopment of Brownfield sites is a complex process and one area where policy decisions should not be simplified to sound bites. We encourage continued discussion so that changes improve on our existing programs and do not take us backwards.

In enacting the Brownfield Act, the Legislature was very cognizant of the need to remove legal, financial, technical and institutional impediments. The Legislature called for "finality in the process, provision of financial incentives, liability protection for innocent parties, cleanup procedures that are cost effective and regulatory action that is timely and efficient." (N.J.S.A. 58:10B-1.2).

As you consider legislation to improve the Site Remediation Program, NJBA encourages you to be mindful of these guidelines and also the private sector's significant role in successful Brownfield remediation. Our members come to sites impacted by others, and obtain *private* capital to clean up Brownfield sites through remediation and redevelopment. Without their involvement, sites will remain contaminated and will continue to impose significant health and environmental costs.

*2/10/08*

NJBA agrees that technical and process improvements are necessary to move redevelopment forward. However, concepts, such as Remedy Selection by the Department or limiting the use of Engineering Controls and Institutional Controls, could be a dramatic step back to the reliance on publicly funded cleanups. Those of us personally familiar with the history of cleanups in New Jersey recognize that the publicly funded cleanup approach involves more SRP personnel time and significantly greater tax dollar expenditures than privately funded cases, most often with little or no possibility to recover those costs.

### **Addressing Backlogs**

The Site Remediation Program is plagued by chronic backlogs that will not be resolved by merely reallocating staff. Instead, **substantial process reforms are necessary** that simplify the review process so that the investigatory work can be remedy driven. Once the ultimate remedy is determined, then investigatory work should be focused solely on the information needed to allow for the approval of that remedy.

**NJBA supports the adoption of third party verification, following the lead of Massachusetts' Licensed Site Professionals program.** The use of outside contractors and privatization is favorable, provided there is appropriate supervision, oversight and auditing by the Department.

### **Remedy Selection**

**In the Stakeholder Process NJBA expressed strong concerns over granting the Department unfettered discretion at any time to change or impose a particular remedy for a site, to the exclusion of all other remedies that would be equally "protective of human health and the environment."**

Brownfield redevelopment requires predictability. The timeframes for obtaining all necessary development approvals extend for years. No one can commit private resources without a reasonable expectation of the costs associated with the project.

Providing broad discretion to the Department would allow the Department to compel a change in the remediation approach late in the process, destroying the concept of predictability. The Department currently has the mandate and the authority to require that all remediation approaches be protective of human health and the environment. If there is a set of possible remediation approaches that **all** are protective of human health and the environment, who should determine which of these protective remedies is best suited to a particular project? The current approach has been to recognize that as long as the remedy is protective, the parties conducting the remediation would have the flexibility to match the remedy with the redeveloped use. It is unclear why there is a perceived need to change that approach. What is clear is that shifting the task of matching the protective remedy with the particular circumstances of a given project would have a tremendous negative impact on Brownfield redevelopment, as it would completely undermine the ability for prospective redevelopers to predict costs of remediation, including expenditures for due diligence activities.

Were remedy selection to move forward, then the Department must identify by rule upfront, the acceptable remedy or remedies that would be acceptable for each type of reuse. The Department should also be required to provide a technical basis as to why other remedies impermissibly fail to

protect human health and the environment. No factual basis was provided during the Stakeholders meetings as to how the current practice fails to comply with the Brownfield Act.

### **Prescriptive vs. Performance**

**NJBA supports further development of a performance based approach for remediation.**

Balance must be struck between the statutory requirements for the Tech Rules (N.J.A.C. 7:26E) and flexibility. The current prescriptive approach under the Tech Rules does not allow for increased efficiencies, but instead has resulted in unnecessary loss of time and increased expense. For example, the issuance of Notices of Deficiencies has often further delayed the progress reviews and increased costs.

In contrast, a “performance-based” approach would be consistent with the intended flexibility required by the Brownfield Act. The Act mandates that DEP establish a variance program when the party conducting the remediation “can demonstrate that the deviation and the resulting remediation would be as protective of human health, safety and the environment.” (N.J.S.A. 58:10B-2b).

### **Engineering and Institutional Controls**

**NJBA strongly supports the use of Engineering Controls and Institutional Controls, as they are a fundamental and necessary tool to effectuating Brownfield reuse.**

By and large, the experience of our members recognizes a preference for permanent remedies. However, the preference is often not viable for economic, practical and technical reasons. DEP’s Office of Brownfield Reuse reported that **over 90%** of Brownfield redevelopment and reuse relied upon Engineering Controls and Institutional Controls. The ability to employ these controls is a fundamental tool in successfully encouraging private capital investment in Brownfield redevelopment.

While NJBA supports the institution of a permit program to track ongoing compliance, any permit program should be carefully designed to minimize complexity and unnecessary constraints and costs.

Further, we must be careful to avoid disincentives that reduce the ability to use Engineering and Institutional Controls that are so fundamental to the successful redevelopment of Brownfield sites.

### **CONCLUSION**

Environmental regulatory programs constrict how and where new housing can be built. It is critically important to provide a **workable** means to redevelop sites impacted by contaminants so that our citizens can find safe and affordable new housing opportunities. As mandated by the Brownfield Act, any proposed reforms should ensure flexibility in cleaning up contaminated sites.

NJBA encourages the Department and the Legislature to continue providing the interested public with the opportunity to comment on specific recommendations to improve the Site Remediation Program.

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ATTORNEYS AT LAW

PLEASE RESPOND TO:

U.S. POSTAL SERVICE ADDRESS:

POST OFFICE BOX 190

MIDDLETOWN, NEW JERSEY 07748

Or:

HAND DELIVERY AND OVERNIGHT SERVICE ADDRESS:

125 HALF MILE ROAD

RED BANK, NEW JERSEY 07701

(732) 741-3900

FAX: (732) 224-6599

www.ghclaw.com

JOHN C. GIORDANO, JR.  
FRANK R. CIESLA  
BERNARD J. BERRY, JR.  
JOHN A. AIELLO  
MICHAEL J. GROSS  
JOHN A. GIUNCO  
EDWARD S. RADZELY  
SHARLENE A. HUNT  
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GERALD P. LALLY

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TARA L. BENSON  
RACHEL M. RINNINSLAND  
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JIN KYOUNG HONG  
KELLY D. GUNTHER  
LOUIS D. TAMBARO  
MICHAEL D. PAWLOWSKI

OF COUNSEL  
JOHN R. HALLERAN  
S. THOMAS GAGLIANO  
THOMAS A. PLISKIN  
RONALD P. HEKSCH  
DERRICK A. SCENNA

JOHN C. GIORDANO  
(1921-1989)

CERTIFIED BY THE  
SUPREME COURT OF  
NEW JERSEY AS A CIVIL  
TRIAL ATTORNEY

DIRECT DIAL NUMBER

DIRECT EMAIL

arobins@ghclaw.com

CLIENT/MATTER NO.

1753-126

September 25, 2007

VIA REGULAR MAIL / E-MAIL

Irene.kropp@dep.state.nj.us

Ms. Irene Kropp, Assistant Commissioner  
Site Remediation

New Jersey Department of Environmental Protection

P.O. Box 028

401 East State Street, 6<sup>th</sup> Floor

Trenton, New Jersey 08625-0028

**Re: Comments on Draft "White Papers" from Site Remediation Program (SRP)  
Stakeholder Process on Legislative Reform**

Dear Assistant Commissioner Kropp:

The New Jersey Builders Association offers the comments below regarding the eleven (11) draft White Papers (White Papers) as forwarded by email August 29 and again on September 11. We understand that other comments are also being received and we encourage continuation of a process by which all of the participants in the Stakeholder Process can comment on any changes to the white papers. We encourage you to share the various comments received and allow further input as warranted.

Overall, on behalf of NJBA, we would note our appreciation for providing an opportunity to express the concerns and needs of our membership. As you know, NJBA is comprised of home builders, craftsman, professionals and supporting industries that not only employ thousands of our citizens but more importantly provide one of the most fundamental of all basic needs, housing. As our State, led by the Department, continues to impose a complex set of regulatory programs constricting how and where new housing can be built, the need to provide a workable means to redevelop sites impacted by contaminants becomes even more critical to allowing our citizenry find safe and affordable new housing opportunities. We hope the

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Department considers how some of the proposed changes to the SRP process will impact the ability to address the persistent shortage of workforce housing in this State.

During the Stakeholder meetings, a number of viewpoints were put forward that were openly antagonistic to the concepts that are fundamental to encouraging private sector investment into Brownfield sites. We remain concerned that a focus on economic and technical realism can be overwhelmed when faced with unrealistic political posturing and unsubstantiated rhetoric. As the only group represented in the Stakeholder Process that is comprised of members who directly invest their private capital in Brownfield redevelopment, we hope the Department will consider our comments carefully. Our comments are offered with the weight of our members with a significant experience with actual sites facing economical realities. In that light, we remain prepared to work with all interested parties to improve upon a system that has started to make the redevelopment of many of New Jersey's Brownfield sites a realistic means of providing much needed safe and affordable housing for our fellow citizens. We commend the Department for taking the time to listen to our voices.

Our comments will not be focused on the wording or layout of the Papers but rather on the intent and spirit of each issue and possible next steps/recommendations.

**Overall Approach to Reforms**

While the comments below are divided amongst the various draft white papers, the interaction amongst the various topics should not be overlooked. Any modification to the Site Remediation Program, changes to the enabling legislation or the implementing regulations, must be viewed as to the impacts on the program overall.

For example, as noted below, many of the contemplated changes will have significant impacts on whether the Department can make progress in addressing the programmatic backlogs currently plaguing SRP cases. Without substantial process related reforms, the addition of staff alone will do little to address these chronic backlogs.

More critically, concepts that limit or restrict flexibility in addressing contaminated sites are contrary to the policy of encouraging the use of private capital to conduct Brownfield Remediation. Concepts, such as Remedy Selection or limiting the use Engineering Controls and Institutional Controls, if implemented, will dramatically shift the emphasis back decades to the time when there was virtually exclusive reliance on publicly funded cleanup as the instrument of remediating contaminated sites that are not being addressed by the responsible parties in a timely basis. Historically, the publicly funded cleanup approach involved even more SRP personnel time and significant greater tax dollar expenditures than privately funded cases with little or no recovery of those costs.

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Overall, the discussions to date have not resulted in any significant consensus. Clear recommendations were not put before the Stakeholder group. Once there are clear recommendations of a proposed change, the Department should vet the proposed concept with willing participants from the Stakeholder group before proposed changes are put before the Legislature or the subject of a rule proposal.

### **Prescriptive -vs.- Performance**

The draft White Paper on this subject incorrectly conveys the idea that the current reliance on strict adherence to the Tech Rules (N.J.A.C. 7:26E) is flexible. To the contrary, the current prescriptive approach does not adequately allow for increased efficiencies. Many specific examples were given as to how the current application of the Tech Rules has resulted in unnecessary loss of time and increased expense. The recent shift to Notices of Deficiencies has often further delayed the progress reviews and increased costs in many instances. The White Paper should reflect that experience.

The White Paper should also reference the statutory mandate of flexibility. While the Brownfield Act (N.J.S.A. 58:10B-2a) provides for rules such as the Tech Rules, it also mandates that the Department establish a variance program whenever the party conducting the remediation "can demonstrate that the deviation and the resulting remediation would be as protective of human health, safety and the environment". (N.J.S.A. 58:10B-2b.) A performance based approach clearly is consistent with the intent of N.J.S.A. 58:10B-2b.

The draft does not fully describe what is meant by "performance based". One explanation that was offered was that in a performance based approach the question should always be asked "how would any additional contemplated work impact the approval of a remedy?". If a realistically possible impact cannot be identified, the contemplated work should not be required. By way of example, if the remediation concept involves removal of all impacted soils over an area that encompasses all AOC's why would delineation of each AOC be required? In most, if not all instances, the performance based approach would result in the conclusion that delineation of each AOC would be wasteful.

### **Addressing Backlogs**

Overall, the Department needs to implement reforms that simplify the review process so that the investigatory work can be remedy driven. When the ultimate remedy is understood, investigatory work should be focused solely on the information needed to allow for the approval of that remedy.

The White Paper should note that reforms must go beyond staffing increases. The discussion regarding Licensed Site Professionals, use of outside contractors and more

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privatization under Department supervision should be strengthened. The proponents of such reforms consistently emphasized that all such work done by persons not employed within the Department should be subject to appropriate supervision, oversight and auditing by Department personnel as appropriate for each program.

Public Participation should be focused on information dissemination, not complex checklists or hearing processes that provide no additional factual input. Presumptive remedies and performance based reviews should be used.

**Remedy Selection**

Despite the unsupported statements in the draft, no factual basis was shown as to the need for the Department to control which of the remedies are appropriate. As should be reflected in the White Paper, the current statutes vest the Department with the authority to require that the remedy selected for a site is "protective of human health and the environment". The factual basis for greater authority was not presented during the Stakeholder sessions.

Any change that would provide the Department with the discretion to impose a remedy must also require that the Department identify the acceptable remedy or remedies that the Department will accept for each type of reuse. The Department should also be required to provide a technical basis for why other remedies would not be permitted.

The current draft needs to be revised to emphasize that remedy selection can have a tremendous negative impact on Brownfield redevelopment if the Department is given the discretion to impose or change a remedy at any time. Such discretion would completely undermine the ability for prospective redevelopers to predict costs of remediation, including expenditures for due diligence activities. Predictability of costs is a fundamental prerequisite for the vast majority of redevelopment projects. Lack of predictability effectively precludes the use of private capital to remediate and redevelop Brownfield sites.

**Engineering and Institutional Controls**

The draft does not correctly detail the extraordinary importance of Engineering Controls and Institutional Controls to Brownfield reuse. The presentation by the Office of Brownfield Reuse detailed that over 90% of the Brownfield reuse cases involved the use of Engineering Controls and Institutional Controls. Clearly, the Department's own experience is that Brownfield redevelopment and reuse is critically reliant on the use of Engineering Controls and Institutional Controls. The omission of this fact from the draft white paper must be corrected.

Beyond rhetorical statements, no information was provided as to the failure of any specific Engineering Control or Institutional Control. The White Paper should so reflect the lack

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of any specific factual experience of the "failure" that resulted in a chronic exposure to contaminants. Rather, specific examples were given of chronic exposure at uncontrolled sites that have not yet been the subject of Brownfield redevelopment.

The discussion in the draft fails to focus on the fact that Engineering Controls and Institutional Controls are put in place to address chronic exposure risks not acute risks. The suggestion that "all caps fail" is based on the false premise that a short-term disturbance or delay in the maintenance of Engineering Controls will result in an unacceptable exposure. That premise however assumes that short term exposures are unacceptable and there is no basis in fact for that assumption.

Prior to the use of Engineering Controls and Institutional Controls, the opportunities for Brownfield redevelopment were extraordinarily limited. The change in policy to use Engineering Controls and Institutional Controls encouraged the investment of private capital resulting in the notable, but still limited, successful examples of Brownfield Redevelopment. The use of Engineering Controls and Institutional Controls are a fundamental and necessary tool to effectuating reuse of Brownfield sites.

To the extent that reform is needed, the use of a permit program could result in an improved way to track ongoing compliance. However, any such permit program must be carefully designed to minimize complexity and unnecessary constraints and costs.

**Acute Exposure/Hot Spot Removal**

As detailed during the Stakeholders sessions, there is a substantial lack of specificity as to the practical meaning of acute exposure or hot spot removal. The draft should also be revised to reflect that the need for acute exposure criteria or hot spot removal must be scientifically based.

**Environmental Insurance**

The White Paper should reflect the lack of an existing market to supply the types of assurance instruments discussed.

The draft does not reflect the factual experience relayed during the Stakeholder Sessions. That experience shows that, in general, insurance or surety products are an economically inefficient means of addressing long-term compliance costs relating to Engineering Controls for the vast majority of sites. The overwhelmingly typical Engineering Control involves the use of structures and pavement to encapsulate soils which pose a risk if there is accidental ingestion after long-term direct contact with those soils. For these sites, maintenance is practically no different than if there was no Engineering Controls present. Hence, for a large number of sites, maintenance would be done in the ordinary course directly by the property owner or tenant.

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Requiring additional surety by bond, trust or insurance, adds to the costs associated with those instruments including the provider's profit margin, the provider's overhead costs, and loss of use of funds by the entity establishing the assurance among other costs. These added costs are passed on to the end users, decreasing the economic viability of the project and thus providing a disincentive to undertaking the project in the first place.

The draft must also be revised to more specifically note that products provided by trusts or sureties, including insurance-based trusts, do not provide unlimited coverage. Rather, they provide coverage for a discrete set of tasks for events over a discrete period of time. The descriptions of the available products, including the description of the Guardian Trust, do not accurately reflect the products currently available. The Department should withdraw this White Paper for further investigation and discussion.

**Public Notification and Participation**

The purpose of public notification and participation must be clarified. Public notification should be addressed separately from public participation.

Public notification should be focused on those sites where the contaminated media or the remediation process itself will occur off-site other than the transportation of materials to or from the site. Further, the public notification process must be sufficiently straightforward so that notification is not time consuming or expensive. The Department's current rule proposal is unnecessarily complex and does not provide sufficient specificity.

With regard to public participation, the need for participation (as compared to notification) is unclear. Currently the approval of a proposed Remedial Action is based on whether that Remedial Action will be protective of human health and the environment. It is unclear how public participation would add to the process.

**Cumulative Exposure**

The discussions on this subject were vague since the concept of what constitutes "cumulative exposure" is undefined. Further, the Brownfield Act prohibits the Department from developing remediation standards based on cumulative effects of more than one contaminant at a site. The draft White Paper fails to provide additional clarity to this topic.

**Historic Pesticides and Pesticide Application**

The paper should more clearly indicate that most participants encouraged continued implementation of the recommendations Pesticide Task Force.

LLH

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Issues related to the presence of insecticides applied in high concentrations should be reassessed with a focus on risk exposures rather than comparison to the soil criteria without context to relative risk.

We hope that the NJDEP will grant the stakeholders an opportunity to comment once legislative recommendations are developed. Once again, thank you for the opportunity to participate in the process and we commend the Department for the considerable effort and substantial time commitment involved in the Stakeholder process to date.

If you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,



ANDREW B. ROBINS, ESQ.

ABR/la

cc: Patrick O'Keefe, Executive Vice President (via email [okeefe@njba.org](mailto:okeefe@njba.org))  
Elizabeth George Cheniara, Esq., NJBA (via email [egcheniara@njba.org](mailto:egcheniara@njba.org))  
Carol Ann Short, Esq. (via email [cshort@njba.org](mailto:cshort@njba.org))  
Joanne Harkins, Director (via email [jharkins@njba.org](mailto:jharkins@njba.org))  
Judith Shaw (via email [Judith.Shaw@dep.state.nj.us](mailto:Judith.Shaw@dep.state.nj.us))

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NEV

TO: SENATOR BOB SMITH, CHAIRMAN, SENATE ENVIRONMENTAL  
COMMITTEE  
FROM: OLGA POMAR, SOUTH JERSEY LEGAL SERVICES  
RE: SITE REMEDIATION PROGRAM REFORM  
DATE: APRIL 15, 2008

I. INTRODUCTION AND BACKGROUND ON ENVIROMNENTAL JUSTICE  
CONCERNS

Please accept these written comments, provided upon the committee's request, to supplement the testimony at the legislative hearing on April 15, 2008.

I am an attorney at South Jersey Legal Services, a private non-profit legal services program that provides free legal assistance to low-income persons in seven counties in southern New Jersey. Our office represents several community organizations concerned about environmental contamination in their neighborhoods, including the South Jersey Environmental Justice Alliance, a coalition group dealing with environmental justice and public health issues in predominately low income, African-American and Hispanic communities, including Camden City, throughout the southern section of the state

The issue of site remediation is of special concern to environmental justice advocates.

The proliferation of contaminated sites in our urban communities, such as Camden City, Salem, Carneys Point, Penns Grove, Gloucester City, and Westville, has a significant effect upon health and quality of life. Many contaminated sites date back to the time that these cities were industrial centers. In more recent years, many of these communities, became dumping grounds for undesirable, polluting uses, while at the same time receiving minimal attention and resources for remediation.

Camden City stands out as a classic example of such environmentally discriminatory practices. It contains 114 known contaminated sites, including two Superfund sites, plus an additional 94 suspected contaminated sites. Common pollutants are lead, mercury, PCB's, volatile organic compounds, arsenic, and petroleum products. Many of these sites are scattered throughout residential areas, and are immediately adjacent to homes, schools, day cares, and parks. The sites have sat for decades, unmarked, unfenced, and unvegetated. Children play in them, they are sometimes used as gardens and side yards, and they generate dust that spreads through the neighborhood. In addition, these contaminated sites have contaminated the groundwater and local drinking water sources. At the same time, Camden is the host community for numerous polluting industries, including over 30 recyclers and waste disposal facilities, a regional incinerator and sewage treatment plant. Many of these industries, especially the scrap yards, junkyards, recyclers of hazardous waste containers, and industries that use or generate hazardous substances, are creating new contamination of the soil and groundwater. We know, for example, that Camden has very high PCB levels in the air and in the sewer system, from yet unidentified sources. In addition, the environmental problems in Camden have been exacerbated by a history of poor enforcement. Furthermore, very few contaminated sites in the City have been cleaned up.

Although children in places like Camden City are being exposed to all kinds of contamination in homes, in schools, in the air they breathe, in the soil they walk on and play in, and in the water they drink, they are not being tested for this exposure, so we have no way of knowing the extent of the harm to public health. It is well known, however, that environmental degradation of a community causes real injury to residents. Studies have shown that there are higher rates of cancer and other diseases in populations living near toxic sites. We also know that Camden City has elevated cancer rates, especially for lung, stomach, and esophageal cancer, and while both the nation and state have cancer as the second leading cause of death, in Camden City it is the leading cause.

Site remediation is therefore a significant environmental justice issue. As urban communities are increasingly targeted for development because of the scarcity of undeveloped land, it becomes particularly critical that remediation it is done in a manner truly protective of public health.

We greatly appreciate the opportunity to provide input to the legislature regarding this critical issue of reforming site remediation. These comments will focus on several issues, some of which Commissioner Lisa Jackson also identified as areas for reform by, as follows:

- a) Remedy selection;
- b) Public participation;
- c) Prioritization of sites for clean up;
- d) Cumulative impacts;
- e) Healthy schools

We urge the legislature to consider all of these interrelated issues to implement a meaningful program of site remediation and brownfields development, rather than piecemeal reform.

## II. REMEDY SELECTION - MAKING SURE SITES WHICH POSE THE HIGHEST RISKS FOR EXPOSURE ARE PROPERLY REMEDIATED, NOT JUST CAPPED

A major needed legislative reform is to restore DEP's authority to mandate appropriate clean-up remedies

As this committee is aware, ISRA, N.J.S.A. 58:10B-12g, was amended in 1993 to allow the developer to select the remedy for remediation, provided that the developer show that the exposure to the contamination is so limited that the resulting cancer risk to the public is no more than 1 per 1 million.. Our experience in this state since that time has shown that this approach is not protective of public health. Due to cost considerations, private entities generally choose a remedy that leaves the toxins in place and uses "engineering and institutional controls," or capping, such as pavement, building foundations, a layer of clean or less contaminated fill, liners, and other barriers, to cover and contain them. Approximately 90% of contaminated sites in New Jersey are being capped. The 1993 change in the law has therefore resulted in over-reliance on these controls, instead of more thorough permanent clean-ups, even where there is risk of exposure to the most vulnerable populations.

In the long run, this "paving over" of contaminated land is not conducive to a healthy, safe living environment, protection of natural resources such as drinking water, or to building economically vibrant, sustainable cities and towns. Even if the cap is adequate to limit exposure, the groundwater beneath the site continues to spread contamination and reduce the areas that can be used as water sources. The uncertainties associated with capped and use-restricted sites, the limitations on reuse, and the potential for liability, will discourage investment where there is widespread contamination remaining on sites, hurting redevelopment of our urban areas.

In addition, as the DEP has recognized (see Legislative White Paper on Institutional Controls) use of caps has proved highly problematic. Caps are a temporary remedy, and will eventually fail unless they are constantly maintained. They can deteriorate, break, and leak. They can be damaged during natural disasters such as hurricanes, floods, fires, and earthquakes, or disturbed by human activity. It has become increasingly apparent that it is not possible to monitor and maintain an ever increasing number of these capped sites. There are particular problems with using caps on landfills, where high degree of contamination is often present and there is greater risk of the ground settling and of gases accumulating below the surface. (See DEP White Paper on Remedy Selection).

Two recent examples from Camden City illustrate how capping is currently being used even when very young children, who are the most vulnerable population, could be exposed to the contaminants. The Early Childhood Development Center, a preschool for children with disabilities and special needs, was built on land used for decades as a dump. The foundation of the original building crumbled and a new school was proposed to be built the site. During construction, high levels of arsenic, lead, polycyclic aromatic hydrocarbons, and other contaminants were found in the soil below. The School Construction Corporation's consultant proposed to leave most of the contamination and to cover it with the building foundation and two feet of clean fill. This work plan has been approved by DEP. The Salvation Army has proposed building a new community center that would offer recreational, sports, educational, and community activities. It is being built on a section of the Harrison Ave landfill, which is a severely contaminated site. The proposed plan for this parcel is to remove some of the contamination, including the area underneath the new building and a particularly toxic hot spot, but to build new ball fields and play areas over buried landfill waste.

Commissioner Jackson has recognized that the current law has constrained DEP's ability to determine the appropriate method of clean-up. It is time to revisit this law and amend ISRA to authorize DEP to require full removal of all contamination on certain types of sites, such as those that will be used as daycares, schools, playgrounds, and residences.

Furthermore, this authority of the DEP must be exercised through application of unambiguous clean-up standards that do not give developers and responsible parties inappropriate discretion in determining the scope of remediation. This is especially critical if the DEP moves toward greater reliance on outside entities to conduct remediation-related activities.

### III. PUBLIC NOTICE AND MEANINGFUL PUBLIC PARTICIPATION

The community must be given notice and an opportunity to have meaningful input on clean up and reuse of contaminated sites, including grants for hiring independent consultants.

There is no mechanism in the current site remediation process for public notification and public involvement. Area residents are not made aware of the presence of contaminated sites in their community and the risks that the contamination may pose to the public. Developers and the DEP make determinations regarding the scope of environmental investigation and the clean-up remedy without notice and input from the community members who are most affected by the environmental conditions on site. As the remedy selected affects future use of the site, residents are thus excluded from the planning process for their neighborhood and have no say on whether the proposed reuse of the site is consistent with their vision. Residents are not given notice of proposed remediation activities, and are not provided any opportunity to give input on whether proposed engineering and institutional controls, if any, are reasonable and feasible. Once the remediation starts, residents are not made aware of the potential risks for exposure during clean-up or how these exposures can and should be reduced. Residents are also not informed about monitoring of engineering and institutional controls.

DEP has proposed rules that would expand public notification. While these rules would be an improvement, they do not allow residents meaningful input into the most important decisions, such as remedy selection. When the law is revised to give more authority to DEP to select the remedy, the law should also require that there be a formal mechanism for public comment, such as required public notice, open meetings, opportunity for oral and written comments, and response to the comments.

Finally, to empower residents to be able evaluate the exposure risks and the adequacy of clean-ups, especially for more complex, large, and severely contaminates sites, a fund should be created that would be used to award grants for resident groups to hire independent experts. This program should be financed primarily through fees paid by responsible parties and modeled on the Superfund Technical Assistance Grants. This proposal found considerable support in the DEP's Stakeholder group.

#### IV. PRIORITIZATION AND EFFECTIVE ENFORCEMENT

Mechanisms are needed to prioritize sites, enforce prompt clean-up, and ensure that the reuse of the site is to the benefit of the community.

As this committee has heard in detail, there are already some 18,000 known contaminated sites, with another 200 to 300 sites being added every month. Particularly in our urban areas, these sites languish for years, endangering public health and blighting the communities where they are located. According to media reports, at least 6,461 of the sites in New Jersey are more than 5 years old. In Camden, for example, many of the sites on the DEP's Known Contaminated Site List (KCSL) have been known to be contaminated for decades, and have seen no clean up action to date. Camden's largest contaminated site, the Harrison Ave municipal landfill, was closed in the 1970's. and clean up commenced, only during the last year, so that much of environmental damage from this highly toxic site had already taken place. Coal gasification sites all over the state were discovered in 1982, and responsible parties were identified for many of the sites. The

coal gasification site in Penns Grove was finally remediated last year; Camden's has seen no action in 26 years.

Market dynamics, rather than protection of public health and natural resources, have generally dictated which contaminated sites are remediated. In Camden, it is the areas with the most valuable real estate that have attracted developers and have been cleaned up, such as the RCA building which was transformed into luxury apartments, the industrial sites which became the Waterfront entertainment district, and the ABC drum site near Rutgers University which is being used for new market rate homes. This approach may seem to make economic sense, but it is very shortsighted. From a public health perspective, it is dangerous to ignore the sites with the most severe contamination that are closest to residences, schools, or playgrounds. It is also unwise to ignore the sites that may contaminate drinking water sources and damage our natural resources. In addition, to the extent economic development is a factor, priority should be given for development projects that benefit local residents through job creation and neighborhood improvements.

DEP has acknowledged that it does not have the resources to effectively oversee this inventory and ensure that proper and prompt remedial action is being taken at each site. The Commissioner is proposing that DEP rely on third party consultants to manage this caseload. The privatization of site remediation will only further reduce accountability, however, and undermine public trust. Instead, the DEP should develop a system for prioritizing sites, and retain oversight of at least those sites which pose greatest risk to public health. DEP has twice undertaken prioritization of the KCSL, but still has not produced a prioritized list, nor created a mechanism for ensuring that the most toxic sites are remediated promptly. Legislation may be needed that would require DEP to prioritize sites for clean up based on public health and other relevant concerns, providing some guidance for that process, and mandating that expenditure of public funds for remediation be consistent with those priorities.

Furthermore, whatever loophole exists in the current regulatory system that allows sites to remain unremediated for decades needs to be closed. Stricter fines and penalties are needed to give greater incentive to responsible parties to conduct prompt clean up. DEP must be given adequate resources to perform its duties in mandating, managing, and overseeing clean up of these properties.

#### V. PROTECTING PUBLIC HEALTH BY TAKING INTO ACCOUNT CUMULATIVE IMPACTS

Cumulative impacts must be considered when prioritizing sites and developing remedies for clean-up.

One issue of particular concern to urban communities is the current language in ISRA, N.J.S.A 58:10B-12d, which does not allow for consideration of cumulative impacts when designing clean up remedies. Residents of urban areas such as Camden are exposed to many environmental hazards at one time. The same toxin, such as lead, arsenic or PCB's, may be simultaneously found in the air, the soil, and the water. There are also unacceptable levels of various different contaminants that cause similar health effects. The 208 known and suspected contaminated sites

in Camden contain a toxic soup of chemicals. What constitutes a safe level of a particular contaminant in such a neighborhood is different than in a community where there is only one potential source of exposure, or where there is only one contaminant of concern.

Even though DEP has not yet developed a system for evaluating cumulative impacts, it has recognized that this is an important public health concern. (See DEP White Paper on Cumulative Impacts), ISRA must be amended to allow evaluation of the cumulative and synergistic effects of contaminants as appropriate to protect health, so that as DEP develops this methodology it is not precluded from utilizing it in the context of site remediation. This revision is needed to address the fundamental unfairness that some residents in this state are more exposed to environmental toxins than others, and therefore more at risk.

## VI. MAKING SCHOOLS ENVIRONMENTALLY SAFE

The Kiddie Kollege disaster brought to light some of the flaws in the current system of laws, regulations, and policies governing site remediation and demonstrated the very real health harms that can result. New legislation passed in the wake of that incident requires more thorough testing and adherence to specific health-based standards before a day care facility or school can be built on a potentially contaminated site. However, this legislation does not protect the children throughout the state who are attending schools and day cares where there is existing environmental contamination.

Camden City, for example, has ten public schools that either appear on the DEP's (KCSL) or undergoing investigation for contamination. Eight of these five schools are still operational, such as the Cooper Poynt Elementary School. This school was contaminated by an underground storage tank (UST) that was taken out of service in 1998, but which spilled 10,000 gallons of #2 heating oil into the ground below the building. During the course of the delineation of the contamination plume, free product was observed migrating towards school near classroom R102, occupied by 4 year olds. Air quality testing showed that there were elevated levels of Volatile Organic Compounds in the school, but they were determined not to be related to the plume. Another school, the Lanning Square Elementary School, continued to operate for years after it was placed on the KCSL, until it was closed down in 2003 on an emergency basis due to structural problems. That site, in the middle of a residential neighborhood, still has not been remediated. Many other schools in Camden are located very close to known contaminated sites and/or polluting facilities.

Schools can be toxic environments not only because of soil contamination, but from lead, asbestos, and other sources of contamination within the school. In Camden City, children for years drank water for years from drinking fountains that had lead levels as high as 400 ml, while the action level is 15 ml. The problem was made public and addressed only as a result of action by community activists. No testing was ever done to determine whether the children were harmed.

No one is testing the air quality or otherwise evaluating the risk of exposure to toxins from the contamination known to exist at these schools. No one is evaluating whether any known or potentially contaminated sites nearby are posing any additional risk to the children who attend

these schools or any other schools in Camden that do not appear on the KCSL. The same type of regulatory protections that are being created to ensure that daycares are healthy and safe environments need to be extended to our schools. Laws are needed to require testing not only of new schools, but also of existing schools, to make sure that the children in cities like Camden are not being harmed by exposure to toxins. The environmental testing at schools needs to cover multiple media, and ensure that there is no unsafe level of exposure through air, exposed lead paint, or drinking water.

## VII. CONCLUSION

As recognized by Commissioner Jackson and by this legislative committee, legislative reform and regulatory changes are needed to the site remediation program so that we are not putting all of our state residents, and especially our children, in harms' way. To address environmental justice concerns, new legislation should allow the DEP determine, with public input, how clean-ups are conducted. It should also require that the most dangerous sites are addressed in our most environmentally degraded communities are given first priority, and that cumulative risks be considered.

Thank you for your consideration of these comments.

# **“Rationale For Reforming New Jersey’s Site Remediation Laws Specific to the Clean-up of Sites for Schools On or Near Contaminated Sites”**

Testimony Presented By: Roy L.  
Jones, Co-Chair

Coordinator South Jersey  
Environmental Justice Alliance, Inc.,  
Board Member New Jersey  
Environmental Federation

Submitted to: Senate Committee On  
The  
Environment and The Assembly  
Committee on Environment and Solid  
Waste

**Introduction: School Site Remediation Clean-Up in New Jersey Represents A System In Crisis**

Good Morning Committee Chairman and all committee members.

My testimony will speak to the need to "Reform New Jersey's Site Remediation Laws specific to the clean-up of Schools on or near Contaminated Sites."

In New Jersey, hundreds of schools have been built and are being built on contaminated sites throughout the state. This crisis affects thousands of school-age children and it inordinately affects thousands of poor and minority children more adversely.

Many parents are deeply troubled that when (32) suburban children were affected by mercury contamination at Kiddie College in Franklinville, New Jersey state officials rushed to establish laws that protect children in day care centers. Yet, as of today, no one has rushed to protect over (500,000) children affected by schools that are built on or near contaminated sites in mostly poorer communities and communities of color.

**My single purpose for being here is to present testimony that hopefully will compel you to reform site remediation laws specific to setting high standards for the clean-up of contaminated near schools or where new schools are to be built.**

**New Jersey's Site Remediation Clean-Up Is A System In Crisis**

**First**, though New Jersey utilizes a process that requires environmental assessments and partially pay for site remediation; including a very modest flawed public participation process. New Jersey has completely mishandled the clean-up of school sites and in the process mismanaged "billions" of dollars for construction of new schools in New Jersey.

**You should know that the Abbott-based financing school building predicament can be linked to the failure to establish standards that require the highest level of clean-up when schools are to be built on or near contaminated sites.**

**Schools Built on Contaminated Sites Evidence**

In an article written by Megan Taday – Oct. 23, 2006, she presents startling evidence about how the (SCC) as part of a major public works project to build and renovate schools in low-income communities and communities of color, had purchased contaminated land for school construction in several districts. News reports, she claims, have put the number above 100.

**A short list of schools and day care centers built on contaminated sites and clean-up issues includes:**

1. thru (21) Schools in Camden: 10 known-11 closed cases
22. Robert Morris School –Union County (Manhattan Project Site)
23. Martin Luther King School in Trenton,
24. West Brook Middle School,
25. Kiddie Kollege Day Care Center in Franklin Township,
26. An elementary school in Gloucester City, and
27. Ramapo Ridge Middle School,
28. Midtown Comm. School (Neptune (oil on land)
29. Ocean City School (contaminated soil)
30. Manchester Township (hazardous materials from nearby plant)
31. Springfield-Union County (football field contaminated)
32. Perth Amboy Voc. Tech School (soil contamination)
33. North Brunswick H. School (contaminated soil school property and nearby)
34. Elizabeth public school #30 (state sue oil companies for pollution)
35. Mt Vernon Elem. School (Irvington (state sue consulting firms-3.5 m.)
- 36 thru 40. Five Daycare Centers –North Jersey-located near contaminated sites
41. Village Elem. School-North Princeton (clean-up/demo issues)
42. Clifton School (industrial site into school)
43. East Orange (clean-up school site-state sue \$182,000)

**Also, please keep in mind that that there are over 500 Abbott School Districts in New Jersey.**

In New Jersey, the numbers of known contaminated sites are extraordinary high. The total number ranges from 16,000 to 19,000 sites. Most of these sites are located in or near cities where minority children are at greater risk. This represents a major environmental justice concern.

**The ECDC School In Camden As A Worst Case Scenario:**

ECDC School was formerly built on a landfill. After arsenic was discovered at 1000 times the national standard and other equally insidious chemicals, the NJSA convinced the local school board to build a new school on the same site with partial clean-up and capping. This remedy was approved by the NJDEP. Even in spite of protests the new school is being built as I speak. This example could only happen in a very poor school district and in a state where developers dictate clean-up remedies. This must end.

## **Current New Jersey Site Remediation Flaws**

Moreover, many environmental advocates all agree that there are basic flaws in New Jersey Site Remediation Program. These flaws include:

- a) **Current legislation doesn't cover existing daycare centers and schools,**
- b) **NJDEP lacks power to compel permanent clean-up remedy,**
- c) **Clean-up remedies and alternatives not subject to public review,**
- d) **Public hearings are not required,**
- e) **Environmental justice and precautionary health based principles are completely ignored.**
- f) **Current remedy of capping sites doesn't protect human health nor is it the highest standard, and**
- g) **School site clean-up standards training for school board members are absolutely inadequate.**

Furthermore, even NJDEP Commissioner Ms Lisa Jackson believes the site remediation program in New Jersey needs to be overhauled especially as it relates to school siting. She is quoted in a press release by her dept. on Oct. 26, 2006 saying **"contaminants in a facility where our children attend school is frightening, and when these contaminants are above levels that can cause harm, it is completely unacceptable.**

### **Conclusion:**

We as a government bear a legal and moral obligation to ensure the health and safety of children when they attend school.

**In New Jersey and the nation, we cannot ensure the health and safety of children in schools until mandatory policies regarding where schools are to be built and how sites are to be cleaned-up.**

As of April 2008, this crisis is engulfing present school age children and will affect generations to come.

### **Recommendations**

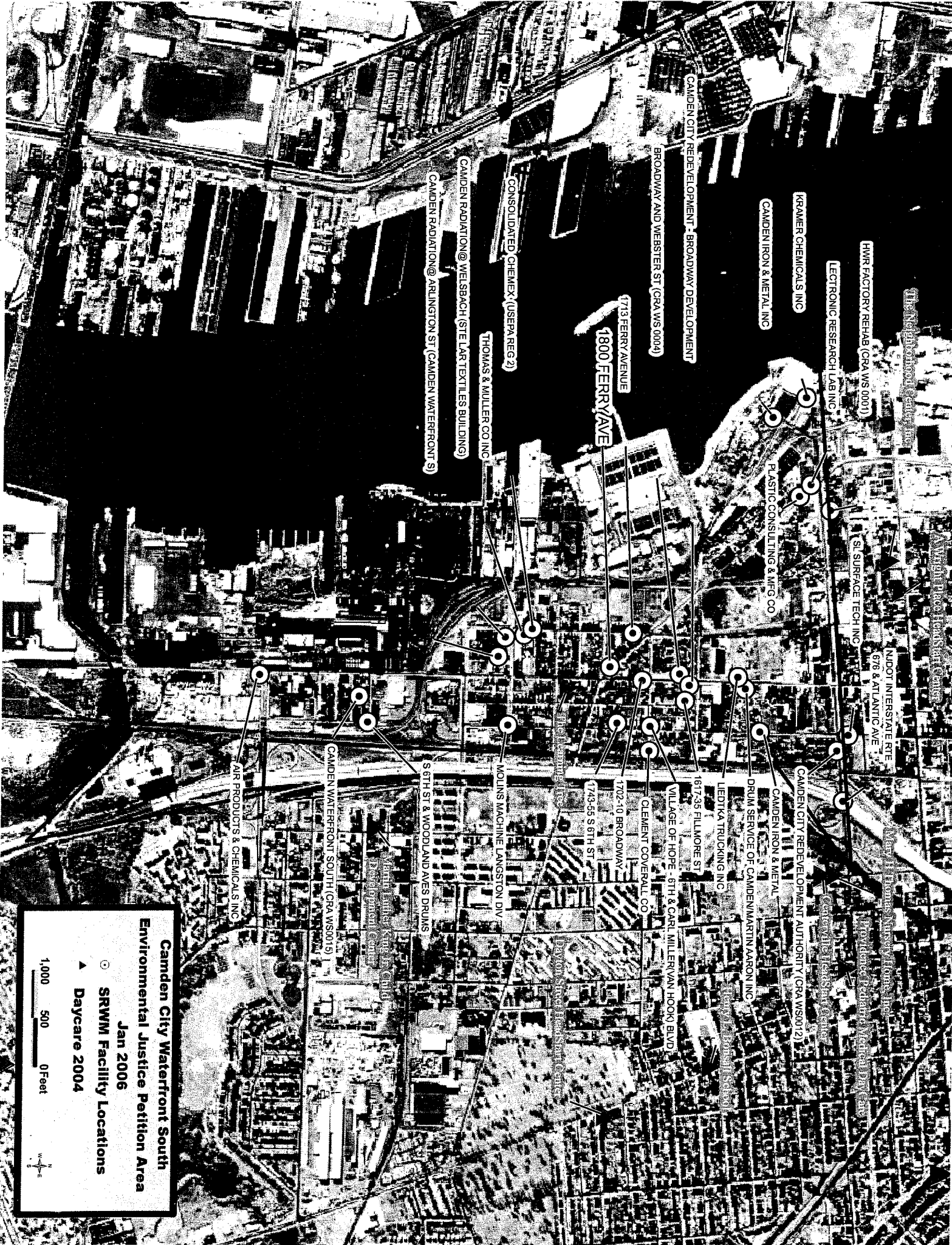
- 1.Reform and or create new site remediation laws to encompass clean-up standards that apply to schools on or near contaminated sites.
- 2.Give NJDEP the statutory authority to choose site remediation clean-up remedies of the highest standards, especially for school sites.
- 3.New law should mandate a public participation process.

4.The NJ Attorney General and NJDEP should be charged with recouping funds from polluters to pay for site remediation clean-ups.

5.Brownfield sites in Abbott Districts should receive highest priority

Presented April 15,2007

**See Attachments:Maps other documentation**



HMR FACTORY REHAB (CRA WS 0001)

ELECTRONIC RESEARCH LAB INC

KRAMER CHEMICALS, INC

CAMDEN IRON & METAL INC

CAMDEN CITY REDEVELOPMENT - BROADWAY DEVELOPMENT

BROADWAY AND WEBSTER ST (CRA WS 0004)

1713 FERRY AVENUE

1800 FERRY AVE

CONSOLIDATED CHEMEX (USEPA REG 2)

THOMAS & MULLER CO INC

CAMDEN RADIATION@ WELSBACH (STELAR TEXTILES BUILDING)

CAMDEN RADIATION@ ARLINGTON ST (CAMDEN WATERFRONT S)

SL SURFACE TECH INC

NDOT INTERSTATE RTE 676 & ATLANTIC AVE

CAMDEN CITY REDEVELOPMENT AUTHORITY (CRA WS0012)

CAMDEN IRON & METAL

DRUM SERVICE OF CAMDEN/MARTIN ARON INC

LEDIKA TRUCKING INC

1617-35 FILLMORE ST

VILLAGE OF HOPE - 6TH & CARL MILLER/RYAN HOOK BLVD

CLEMENT COVERALL CO

1702-10 BROADWAY

1743-55 S 6TH ST

MOLINS MACHINE LANGSTON DIV

S 6TH ST & WOODLAND AVES DRUMS

CAMDEN WATERFRONT SOUTH (CRA WS0015)

AIR PRODUCTS & CHEMICALS INC

Camden City Waterfront South  
Environmental Justice Petition Area

Jan 2006

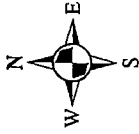
SRWM Facility Locations

Daycare 2004

1,000 500 0 Feet



Monsanto Corp.



### Legend




-  Former Stream Bed
-  Ash Fill Extent
-  Conductivity Probe Locations

Figure 1 - Former Stream Bed and Ash Fill Extent Locations

**Langan**  
Engineering and Environmental Services, Inc.

50 West State Street  
10th Floor, Suite 1002  
Trenton, NJ 08608



Scale: 1" = 150'  
North Arrow  
Date: 11/11/08  
Drawn: [illegible]

Camdett Corp.

ELDC School Site



### Legend

Arsenic Concentrations in Soil (mg/kg)

● 0.00 - 19.99

○ 20.00 - 2000.00

● 2000.01 - 19,999.00

● > 19,999.00



Former Stream Bed



Ash Fill Extent

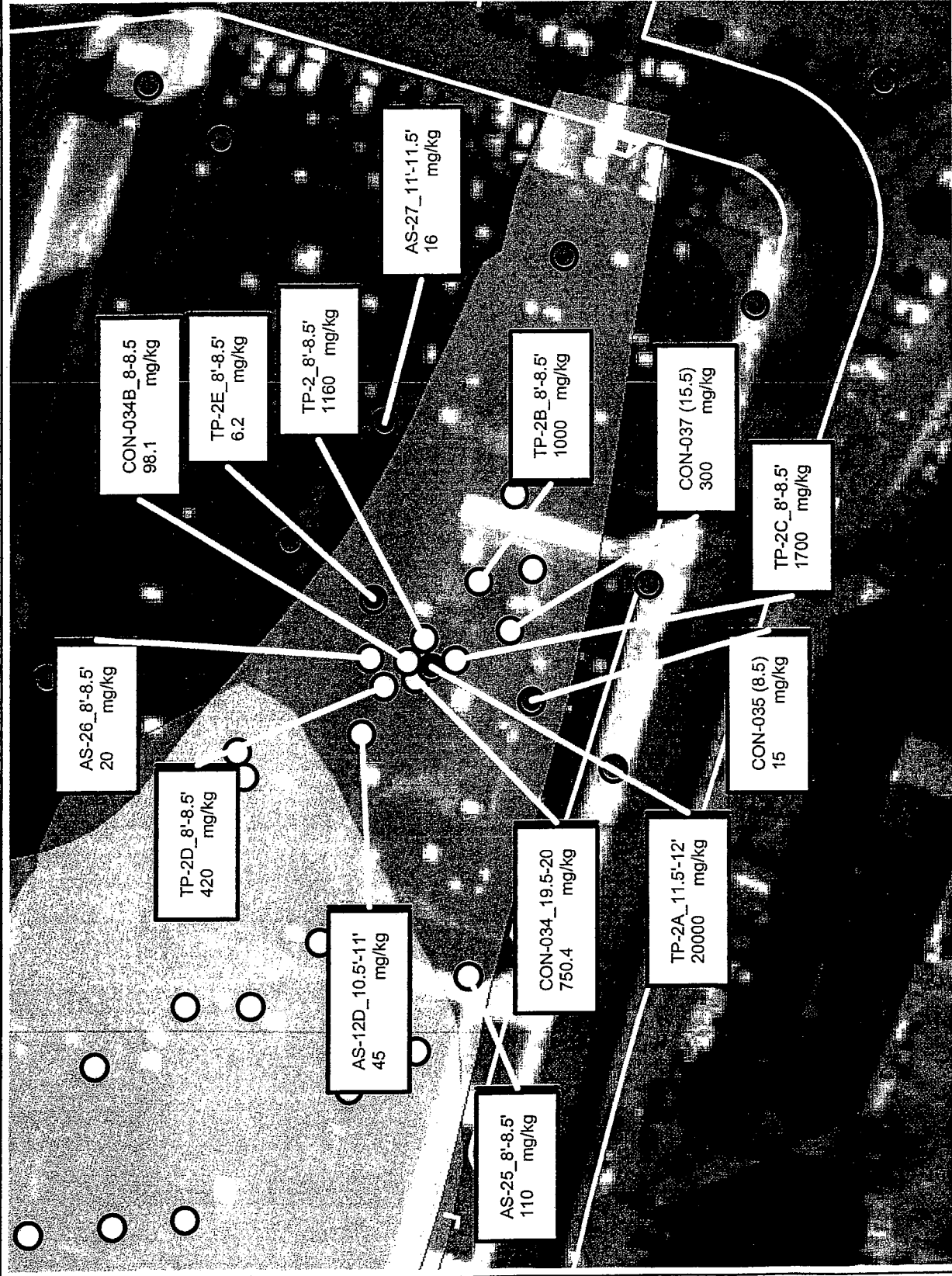


Figure 4 - Test Pit 2 Arsenic Concentrations Greater than 7.5 Feet.

**Langan**

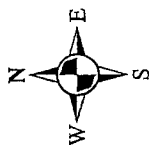
Engineering and Environmental Services, Inc.

50 West State Street

10th Floor, Suite 1002

Trenton, NJ 08608

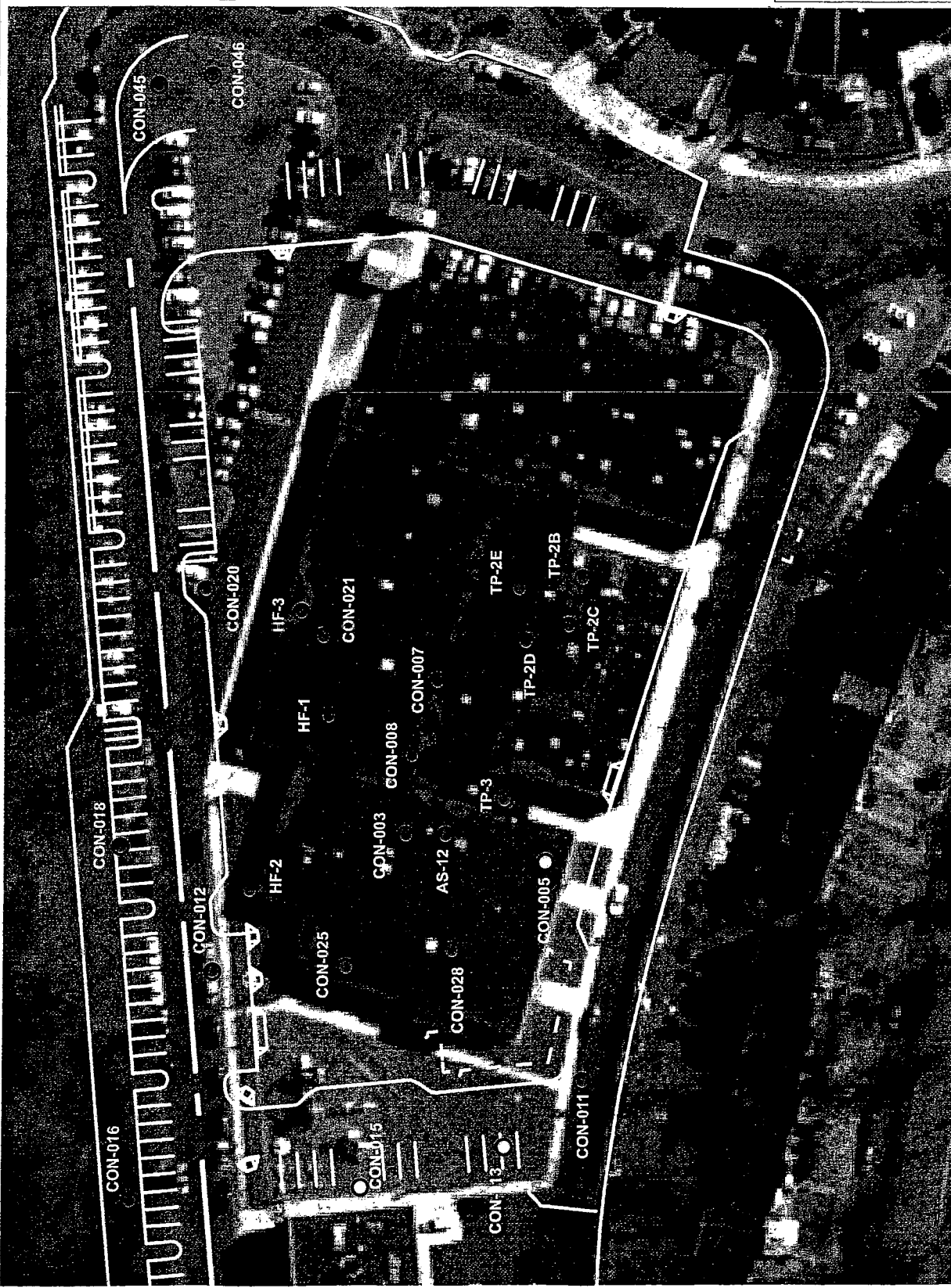
Scale: 1" = 20'  
0 15 30 Feet



# **Legend**

Arsenic Concentrations in Soil (mg/kg)

- 0.00 - 19.99
- 20.00 - 2000.00
- 2000.01 - 19,999.00
- > 19,999.00



**Figure 2 - Arsenic Concentrations in Soil 0 - 7.5 feet**

**Langan**  
Engineering and Environmental Services, Inc.

50 West State Street  
Trenton, NJ 08602  
Trenton, NJ 08603

Scale: 1" = 20'  
0 20 40 Feet  
0 20 40 Meters



# Who's Responsible for Protecting Children in School?



• NJ DEP

No

NJ Dept of Education

No

• US Dept of Education

No

Others

No

• US EPA

No

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## Environmental Justice and NJ Schools – Sustainable Cities Perspective

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- New Jersey Environmental Profile
  - 19,000/32,000 known contaminated sites
  - Schools being built on contaminated sites or near contaminating facilities
  - NJ crisis in Education – Urban Districts
  - 5<sup>th</sup> Smallest State – though most densely populated
  - NJ lead nation in most contaminated sites



## Environmental Justice & Urban Schools – Sustainable Cities Perspective

### Case Study: Camden School District – profile

- 20,000 children
- 3500 employees
- 32 Schools & 35 Daycare Facilities
- Abbott District Designation
- 50 % Drop out rate



# Environmental Justice & Urban Schools

## – Sustainable Cities Perspective

### Environmental Justice Profile

- 214 known contaminated sites
- 3 Superfund Sites
- Regional Sewerage Treatment Plant
- Regional Trash-to-Steam Plant
- 21 Schools listed on NJ DEP – known contaminated issues

What does this mean in terms of  
Sustaining Cities?

## **CAMDEN CITY SCHOOLS ON KNOWN CONTAMINATED SITES**

Information from DEP website and other DEP documents

10/19/07

Cooper Poynt Elementary School - area contaminated by an underground storage tank (UST) that was taken out of service in 1998, but which spilled 10,000 gallons of #2 heating oil into the ground below the building. During the investigation, oil was observed migrating towards school near classroom R102, occupied by 4 year olds. Air quality testing showed that there were elevated levels of Volatile Organic Compounds in the school, but they were determined not to be related to the plume. The school is still operating. The spill has not been cleaned up

Early Childhood Development Center (ECDC) - a head start program for very young children with developmental disabilities and special needs, was built on a dump site in 1977. It was never tested for environmental contamination until it was closed in 2003 and the structure was torn down. Construction of a new school was started on the same site, but construction was temporarily stopped when arsenic and other toxins were found in the soil. Some soil near the surface was removed, but the new school is now being built on top of very contaminated soil and garbage. The school is located immediately next to a now defunct chemical company, Camdett Corporation, and another known contaminated site, the Monsanto property. (see fact sheet)

Lanning Square Elementary School -school continued to operate for years after it was placed on the DEP's Known Contaminated Site List, until it was closed down in 2003 on an emergency basis due to structural problems. The site, in the middle of a residential neighborhood, still has not been remediated.

Molina Elementary School - 100 gallon UST spill, there was some remediation work done, active case.

Morgan Village Middle School -10,000 gallon oil tank was removed in 1992, there was some oil spilled. The site has been investigated and is awaiting clean up.

Dudley Elementary School - active case, soil and potential groundwater contamination, remedial action workplan received in June 2007

Pyne Point Middle School - there was UST spill, with groundwater contamination under school. There is a cap covering the contamination and deed restrictions on the site, meaning that some contamination remains on site.

Bonsall Elementary - UST spill - is active site with soil and groundwater contamination, and also closed file with use restrictions, meaning there is some contamination remaining on site.

SCHOOLS UNDER INVESTIGATION FOR SUSPECTED CONTAMINATION

Davis Elementary School - under investigation

Veterans Middle School - pending investigation for contamination after UST removed in 2005, site investigation report received in July 2006

OTHER SCHOOLS WHICH APPEAR ON DEP WEBSITE LIST - PROBABLY  
BECAUSE OF UNDERGROUND STORAGE TANKS ON SITE

Riletta Cream Elementary School - on list, no information

HB Wilson Elementary School - on list, closed case - UST soil contamination

Mickle Elementary School - on list, closed case - UST soil contamination

McGraw Elementary School - on list, closed case

Broadway Elementary School - closed case on list

Whittier Elementary School - closed case on list

Sumner Elementary School - closed case on list

Lincoln Elementary School - closed case on list

Sharp School - closed case on list

Parkside School - closed case on list

Wiggins School - closed case on list

Powell School - closed case on list

Fetters High School - closed case on list

Dudley School - closed case on list

Hatch School - closed case on list

Washington Elementary School - closed case on list

Woodrow Wilson High School - closed case on list

Yorkship Elementary School - closed case on list

Bonsall Annex School - closed case on list

Jerothia Riggs Adult Education Center - closed case on list

Medical Arts School - closed case on list

**Testimony**  
**Site Remediation Reform**  
**Jorge H. Berkowitz, Ph.D.**  
**Senior Associate**  
**Langan Engineering and Environmental Services**

Testimony Issued on behalf of the New Jersey Chamber of Commerce, the New Jersey Business and Industry Association and the New Jersey Chapter of the National Association of Industrial and Office Parks

Mr. Chairman, members of the committees. Thank you for this opportunity to be heard on the importance of Site Remediation Reform within the New Jersey Department of Environmental Protection.

As you know, as do other members of these committees, I served in the NJDEP's site remediation program for a period of time at its inception in the 1980's. Prior to leaving the Department, I was acting as Assistant Commissioner for Environmental Control and Management. At times, I would be called upon to discuss with the regulated community the importance of having a strong, respected, technically astute, dispassionate Department. Such a Department provides to the public which it serves, the assurance that actions taken by others is neither harmful to the public's health nor the environment. In all the years since I have left the Department, I have not wavered from that view one iota.

I offer this as preamble to my discussion so as to suggest that my recommendations would do nothing to erode the Department's authority or responsibilities. On the contrary, in my view, it would allow the Department to remediate sites quicker, more economically, and enhance environmental quality.

I would like to talk about two major issues:

1. Lack of Resources in the NJDEP
2. Programmatic Reform

**1. Lack of Resources**

Given the current budgetary situation, it is unlikely that government will be able to bring in new people to staff even important programs. However, prior to assuming that more people are the only answer to a burgeoning case load and an increasing backlog, one must seriously ask whether the existing program is one which is efficient and maximizes the utility of its staff. Having Department personnel do everything is no longer feasible or desirable.

## Recommendations:

### -Create a Licensed Site Professional Program

Clearly, the Department can craft a program which relies on the considerable site remediation expertise in this state to assist in site clean ups. Such a program must vet carefully those who are allowed to participate and hold those accountable for their representations to the Department. However, the Department must commit to having this program work for it will not in the context of a Command and Control relationship. The relationship must engender flexibility and consistent communications. The effectiveness of this new effort will be in the specifics as to how it is to be implemented. Nevertheless, we strongly support the concept of the LSP and encourage its undertaking.

### -Hire External Professionals to assist the Department

The Department needs help. One effective way, a way that another program in the Department has been using for nearly 20 years now, is to hire consultants to assist the various case managers to review the voluminous submissions required by the site remediation process. The cost of these professionals will be paid by the remediating party such as it currently is when the Department assesses its oversight cost, therefore costing the taxpayer nothing. Specialized expertise can be brought in on an as needed basis, while not incurring the cost of maintaining this individual on the payroll plus benefits when they are not needed. The cost of having the services of this individual comes without the encumbrances of having to provide benefits when this individual leaves the Department.

## **2. Programmatic Reform**

The state is being cleaned up by private parties, not the government. In a large measure, this was done because the land being cleaned up was extremely valuable. The economy has changed that calculus. Land values have changed precipitously. Remediating contaminated sites is a risky business. However, even with uncertainties in the regulatory process, Brownfield redevelopers were willing to take on the task. That decision is harder today than it was 6 months ago. The Department and the Legislature must incentivize, not disincentivize cleanups because if the private remediating parties do not clean up sites, the job may not get done. Even if government wanted to clean up sites, it is not efficient or equipped to do so on a wholesale basis. I know. I've done it both ways. None of this is intended to suggest the relaxing of technically justifiable remediation standards or being less vigilant. It can mean, on balance, that more

sites get cleaned up quicker with positive environmental consequences and result in sites which can safely be reused for a multitude of purposes.

#### Recommendations:

##### -Introduce Flexibility into the Technical Requirements

The Technical requirements have enmeshed both the Department and the private sector in a command and control relationship. This results in protracted studies with iterative involvement with the Department and little predictability. Sites are studied, studied again, and studied some more... and then we may get around to cleaning them up.

The Technical Requirements are too prescriptive, period. They utilize the "one size fits all" concept in a world where no two sites are identical. The Technical Requirements must be made flexible to allow for the professional judgment of case managers in their approval process. A check list approach, rather than a literal accounting for every item within the Tech Regs, would allow moving sites into remediation quicker without compromising science, public health or environmental protection.

##### -Allow the use of presumptive remedies

In specific circumstance the Department should allow the use of presumptive remedies for a site remediation in order to move into remediation quicker. In most cases, if not all, you need not know where every molecule of contaminant is to select and implement a remedy, even if it is only a partial remedy. Once the remedy is implemented, an assessment of the remedy and any remaining contamination issues can then be made.

##### -Establish Timeframes for NJDEP review

When a submittal is made to the NJDEP, it is nearly impossible to predict when a decision will be forthcoming. It is not unusual to have submissions sit for 6 months or more before they are even reviewed for the first time. By utilizing LSPs and external professionals, the Department should be legislatively mandated to meet specified review times for the various required submissions. Delays are a significant disincentive to anyone who wishes to remediate a site voluntarily or otherwise.

There are many other subjects which I would like to discuss, but time will not allow. Remedy selection, the importance of engineering controls and their absolute legitimacy, long term stewardship, are a few.

However, one thing is certain. This Commissioner and this legislature are serious about Site Remediation Reform. For that, both should be congratulated. The Commissioner says her program is broken. The Department must identify its objectives so that components of the fix are not at cross purposes. The Commissioner has able and talented people, such as Assistant Commissioner Kropp and Ken Kloo of the Office of Brownfields Use who have a proven track record of being fair, practical and objective. This problem can be fixed but we need to work together and listen to one another.

Thank you for your time.



# **New Jersey PEER**

**Public Employees for Environmental Responsibility**

P.O. Box 1 • Ringoes, NJ 08551  
Phone and Fax: (609) 397-8213  
e-mail: [njpeer@peer.org](mailto:njpeer@peer.org) • <http://www.peer.org/newjersey>

Assembly and Senate Environment Committees  
Joint hearing on DEP Site Remediation Program Reforms  
April 15, 2008  
Bill Wolfe, Director  
NJ Public Employees for Environmental Responsibility

Good morning.

My name is Bill Wolfe. I am director of the NJ Chapter of Public Employees for Environmental Responsibility (PEER). PEER is a national alliance of state and federal agency resource professionals working to ensure enforcement of environmental laws, scientific integrity, and government accountability. Prior to joining PEER, I spent 13 years at DEP, and 7 years as Policy Director of Sierra Club, NJ Chapter. I've been involved in the policy issues under consideration today for some time, including serving on Senator McNamara's Brownfields Taskforce that developed the 1997 Brownfields law.

I'd like to thank the Chairs and members of both Committees for conducting this important hearing and inviting me to testify.

I will keep my remarks brief and submit written testimony for your consideration.

I understand that the focus of this hearing has been limited to 4 issues: 1) licensed professional program; 2) insurance; 3) remedy selection; and 4) repeal of the Fast Track law. I understand that additional hearings will be held to discuss a broader reform agenda.

Accordingly, I'd like to make the following points with respect to these issues:

1. Privatization is the cause not the solution to problems
2. Insurance undermines accountability and increases "moral hazard"
3. Remedy selection is key
4. Repeal of Fast Track accomplishes nothing because implementation of that law is subject to a moratorium under Former Governor Codey's Executive Order.

**Licensed professional program – the Massachusetts experience**

73x

According to random and targeted State audits of the Massachusetts program, from FY 1999- FY 2004, only 9 – 36% of cleanups passed the audit (see Tables 1 & 2 of Exhibit 2). Three quarters of sites had violations and deficiencies that had to be corrected. The most frequent violations are summarized in Table 5 – as you will note, these are not “minor” paperwork technical violations, but concern the adequacy of the data and scientific bases upon which important public health, environmental, and economic decisions are based.

Furthermore, DEP has provided no cost study or consultant cost and performance data from the NJ site remediation program that would justify importation of the Massachusetts program to NJ.

Many DEP professionals have told me of shoddy, high cost, and duplicative or unnecessary consultant work. The recent “grace period” program has just begun to document this technical performance record, although I know of no data on cost effectiveness. Poor consultant work compounds the flaws that result from the statutory limitations on DEP’s power and policy decisions not to enforce applicable laws in favor of incentivizing voluntary cleanups and brownfields redevelopment.

Before NJ considers the Massachusetts program, DEP must provide data to justify it and the overall current brownfields policy framework.

### **Insurance**

An insurance scheme is not the solution to weak cleanup laws and lack of field compliance monitoring and enforcement.

To reduce long run risks and costs, the real solution is less reliance on engineering and institutional controls (i.e. caps and “classification exception areas” for groundwater), more permanent remedies, and implementation of traditional field compliance monitoring and enforcement.

Furthermore, insurance spreads the costs of risks and therefore creates moral hazard by reducing accountability and incentives to prevent failures.

For example, consider the costs of our already high car insurance rates would be if there were no traffic laws and lax police presence.

### **Remedy Selection**

In 1993, the Legislature revised cleanup laws to vest remedy selection exclusively with the responsible party. At the same time, feasibility study (alternatives analysis) and public participation was stripped.

This scheme has failed miserably.

Who selects the remedy, the definition of remedy, and the process and basis for remedy selection must be changed in law.

We recommend legislative amendments that

- a) Vest DEP with selection of the remedy.
- b) Remedy selection should be based on a policy of a preference for permanent remedies, reinforced by legislative bans on certain remedies for certain high risk, high priority, or unacceptable ecological impact locations where short term exposure controls are unacceptable (e.g. a cap over volatile organics at a school site or tidally influenced riparian area).
- c) Remedy selection must be based upon a comparison of alternatives. Alternatives analysis must be subject to public review and comment and DEP decisions must respond to community preferences.

We would be glad to work with the Committees to develop policies and scientifically sound criteria to flesh out these recommendations in the form of amendments.

In the interim, please consider our more specific suggestions in Exhibit 3.

Thank you. I would be glad to respond to any questions you may have.

#### List of Exhibits

Exhibit 1 – June 1, 2006 PEER testimony to Joint Assembly Judiciary and Environment Committees

Exhibit 2 – Audits of Massachusetts licensed cleanup professionals program

Exhibit 3 – NJ PEER legislative amendments

Exhibit 4 – DEP “Hot Issue” – Remedial Priority System regulations lapse (12/13/04)

Exhibit 5 – DEP “Options Paper” - Remedial Priority System (9/15/04)

Exhibit 6 – DEP Senate testimony “Reforming Site Remediation Program” (10/23/07)

Exhibit 7 – DEP “Vulnerability Assessment” SRP – (February 2002)

# FRASCELLA & PISAURO, LLC.

ATTORNEYS AT LAW

THOMAS P. FRASCELLA\*

MICHAEL L. PISAURO, JR.\*

\* Admitted in NJ & PA

SUITE 209

100 CANAL POINTE BOULEVARD

PRINCETON, NEW JERSEY 08540

609-919-9500

609-919-9510 (FAX)

www.fplegal.com

April 14, 2008

To: Senate Environment Committee  
Assembly Environment and Solid Waste Committee

RE: Site Remediation

On behalf of the New Jersey Environmental Lobby, please accept the following is NJEL's comments on site remediation. NJEL is a state wide environmental organization comprised of individuals, businesses and other environmental organizations. It has been advocating for the protection of New Jersey's environment and citizens since 1969.

New Jersey once had a progressive site remediation program that was looked at throughout the country. Those times are no longer. The last few years have shown a program that is broken and must be fixed. We as a State cannot afford another W.R. Grace, Kiddie College, Ringwood/Ford plant, and others. For example, the W.R. Grace plant was reported to be clean, but since the site has been re-opened 15,000 tons of contaminated soil has been removed from the "clean" site operated by W.R. Grace in Hamilton. The battles surrounding the clean up of Ford's waste in Ringwood is continuing. It is the job of government to make sure that the citizens of New Jersey are protected. Government is failing.

While NJEL understands that the State is in tough fiscal times and that efforts to promote the economy should be made that can not be a made into an excuse to lessen environmental protections. The choice of economics versus environment is a false choice. We suggest that the outcome of this process is a weakening of environmental protections in order save regulatory dollars and to encourage business; it is extremely likely that that savings will be lost in a few years by the increased expenses in dealing with the aftermath. How much money has the State of New Jersey been required to expend to address the debacle that if W.R. Grace? DEP has levied \$800 million dollar fine which because of a bankruptcy will never be collected. I would suspect that it is an order of magnitude greater to go back and fix the problem than it would have been to have proper oversight of the cleanup to make sure that it was done properly the first time.

7/10/08

Remediation is clearly broken and must be fixed. That fix must make remediation of New Jersey's contaminated sites quicker and more protective than what New Jersey has experienced in the past.

The NJEL, with other groups, issued a letter to DEP dated October 1, 2007 commenting on the draft white papers and NJEL makes those comments part of its testimony today. Additional NJEL would recommend the following changes among those proposed by the environmental community.

#### *Amendments to NJSA 58:10B-12*

NJSA 58:10B-12 must be amended. All sections must be amended to include that the standards that are to be set are based upon the best available science and established in a manner that there is a margin of error. By setting a margin of error there is additional assurances that if the original standard is not protective enough that there is a cushion. Subsection (b)(3) should be removed. DEP should be able to be conservative and in fact should be required to be conservative in setting margins of safety.

NJSA 58:10B-12(d)(2) must be amended. DEP must be able to establish health risk standards not only for individual contaminants but for the cumulative affects that multiple contaminant can or do have at a site or at sites.

The more we learn about how contaminants are interacting the more we are learning we have lots to learn. Right now, while are knowledge is increasing, we know so little about the chemicals we use. According to a 2006 GAO report, the testing performed by EPA on new chemicals do not provide anything but limited assurance that the chemical is safe to human health and the environment. In fact reality is worse than this statement would lead us to believe because the report indicates that "EPA does not routinely asses the human health and environmental risks of existing chemicals...." GAO Chemical Regulation: Actions Are Needed to Improve the Effectiveness of EPA's Chemical Review Program, 4 (2006).

Given that most chemicals that are in use today or that were in use and now have migrated into our environment have never been adequately tested for its effects on the environment and human health, we must assume that these chemicals are harmful. We must also assume that these chemical have and will continue to mix and interact with other chemicals. In order to "protect public health and safety," begin to look at the cumulative impacts of these chemicals. We must begin to be proactive in dealing with these challenges and not wait until a kiddie college, W.R. Grace, Ringwood/Ford plant comes along. We must shift the paradigm when we address the remediation of contaminated sites in New Jersey.

#### *Institutional Controls.*

Institutional controls do not work. They especially do not work without constant monitoring and enforcement by DEP. In a review of institutional controls by the U.S. Government Accountability Office, the GAO found that institutional controls "were often not implement before the cleanup was complete," as required. Also in a recent case from the U.S. District Court of New Jersey dealing with chromium contamination by Honeywell the Court

noted that damage to the institutional controls were not repaired by Honeywell absent a direct order by DEP. This demonstrates that without constant, frequent and comprehensive oversight by DEP it is likely that institutional controls will provide temporary at best relief which will be inadequate to protect human health over the long run. This in turns means that DEP must have the monitoring and enforcement resources to ensure that institutional controls are installed properly, that they are maintained, repaired and replaced prior to the additional release of contamination.

Given that all institutional controls will fail over time; the permanent use of institutional controls cannot be found to be statutorily authorized. Institutional controls are supposed to provide a containment of contamination which is "protective of public health and safety." A solution that must fail cannot be protective of public health and safety. If the Honeywell case is any indication of the general course of dealing by both business and DEP there is no assurance that as an institutional controls begin to fail that this condition will be recognized by the responsibility parties and that corrective action will be taken prior to escape of hazardous substances. Therefore, institutional controls are not protective of public health and safety.

Additionally those institutional controls that rely on the recording of restrictions with deeds on the property have also been found to be fairly ineffective. The Environmental Protection agency has expressed concerns over the use of this process because of drafting issues.

#### *Licensed Professional.*

Again while acknowledging that the State is in tough budgetary times, NJEL does not believe that outsourcing responsibility to oversee and regulate the clean up on contaminated sites is in the long term interests of the State.

Looking at the experience of the Massachusetts program it would appear that the Licensed Site Professionals program is not a successful program. Under the program Mass's DEP performs audits and from 2005 data it appears that 3 out of 4 audited clean-ups failed the audit for one reason or another. According to a presentation given by April 2006 by Mass' DEP' on auditing of institutional controls 50% of the paper review audits required additional work. A review of the legal instruments created to implement the institutional controls showed that 64% of them needed follow-up actions. Even more recently Mass DEP performed a level 2 audit on 74 sites between January and March 2007. 17 sites were in non-compliance. Of the 40 level 3 audits performed during the same time, 26 notices of non-compliance were issued.

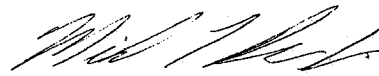
The review of Mass program above clearly shows that there is an unacceptable level of non-compliance with environmental laws in the clean ups performed by Licensed Site Professionals. The solution is not to abrogate the State's responsibility to protect the health and well being of the citizens of New Jersey nor the environment. The solution is adequately fund DEP and give them tools and resources necessary to select remedies that are protective, are long term solutions emphasizing permanent remedies, and to enforce the laws. The current situation at DEP is that they do not have the resources or the authority to do their job. As Senator Smith aptly noted in the Senate Environment Committee meeting on January 28, 2008, the cost of permits review was not collected as fees and that DEP was chopped to shreds in the 80s and 90s. Bring back DEP to the level that it should be so that it can proactively deal with the clean up of

this state instead of it having to back after the fact and fight to re-open cleanups that were supposedly done years before. This would be more efficient and in the long run likely less expensive than the current situation.

*Conclusion*

The legislature must look to strengthen DEP's authority to control the remediation of contaminated sites. That strengthening must come with a commitment of resources; regulatory authority and meaningful public participation. We must go back to the proud heritage of New Jersey and make meaning the declaration of the New Jersey legislature when it declared: "strict remediation standards are necessary to protect public health and safety and the environment; . . . that unrestricted remedies for contaminated sites are preferable and the State must adopt policies that encourage their use . . ." NJSA 58:10B-1.2.

Very truly yours,



Michael L. Pisauero, Jr.

**Joint Public Hearing  
of the  
Senate Environment Committee/Assembly Environment and Solid Waste Committee  
Tuesday, April 15, 2008**

**Testimony of Steven T. Senior, Esq.  
Riker, Danzig, Scherer, Hyland & Perretti LLP**

My name is Steven Senior. I am an environmental attorney with the law firm of Riker Danzig and I am participating in the New Jersey Department of Environmental Protection's Legislative Reform Stakeholder Process in my role as a Co-Chairperson of the Technical Regulations Advisory Coalition, also known as TRAC. TRAC is an association of environmental professionals, primarily engineers, geologists, scientists and attorneys, who have significant expertise and years of experience in remediating contaminated sites in New Jersey. TRAC and its members are actively engaged with the DEP to improve the remediation of contaminated sites in New Jersey by participating in the agency's advisory and work groups, such as DEP's Site Remediation Advisory Group, the "Top Ten" initiative, the vapor intrusion work group and the on-going Legislative Reform Stakeholder Process. TRAC frequently comments on DEP's rules and standards and the agency often incorporates TRAC's technical suggestions into its proposals.

*Licensed Site Professionals*

Many of TRAC's members will be Licensed Site Professionals, if such a program is created. At this point, TRAC has not taken a position supporting the creation of an LSP program, but I believe that TRAC would support an LSP program that is properly developed and addresses the problems we see in site remediation today. The devil will be in the details. The LSP program should include appropriate licensing requirements, allow licensed professionals to exercise best professional judgment, and provide accountability through DEP auditing and an oversight committee or board. TRAC remains ready to assist the DEP, and the Legislature, to develop an LSP program.

*The Tech Regs "Cookbook"*

I believe that an LSP program will not give rise to faster, better site cleanups and redevelopment projects, unless DEP's use of Technical Requirements for Site Remediation, called the Tech Regs, also is reformed. In the experience of TRAC's members, the Tech Regs are a detailed set of requirements that too often are applied formalistically and rigidly, like a cookbook, without consideration of site-specific circumstances or the flexibility that is allowed by the existing Brownfields and Contaminated Site Remediation Act. See N.J.S.A. 58:10B-1.2 and -12. The Tech Regs are too process oriented, not focused on the goals of obtaining safe and cost efficient site cleanups that are protective of public health and the environment.



Many brownfield sites in New Jersey can more effectively be cleaned up and redeveloped, if the Tech Regs are applied flexibly as guidance and if site-specific risk assessment and other performance-based standards are used. Many other states and the federal Environmental Protection Agency currently use these cleanup methods -- New Jersey is out of step. Particularly the detailed investigation and delineation requirements of New Jersey's Tech Regs are cumbersome, too prescriptive and give rise to substantial delay in the cleanup and redevelopment of sites. A more flexible approach is needed. An LSP program won't solve many of the problems and delays we see with site cleanups in New Jersey, if the Legislature or DEP doesn't also reform the use of the Tech Regs.

### *Remedy Selection*

The flexibility allowed to the property owner to choose the remedy for a contaminated site -- currently provided in the Brownfields Act -- promotes the continued cleanup and redevelopment of New Jersey's brownfields. Yet the Brownfields Act currently provides DEP with the authority to reject any cleanup plan for a contaminated site if the agency determines that the cleanup would not protect public health and the environment. DEP does not need new statutory authority to choose the remedy or require a specific remediation method for contaminated sites in order to properly carry out its mission. If the Legislature elects to modify the current remedy selection process, it should do so narrowly to avoid creating new impediments to brownfields cleanup and redevelopment.

Remedy selection was addressed by the Legislature in 1993, in S.1070, and 1997, in S.39, wherein the Legislature determined that the site owner or party conducting the remediation should select the remedy for a contaminated site. This legislative action was intended to reform DEP's early remedy selection process -- one based upon the preparation of detailed feasibility studies and alternatives analyses -- that was inefficient and an impediment to the cleanup of brownfield sites. A return to these time- and cost-intensive remedy selection processes also would not be productive.

### *Engineering and Institutional Controls*

The use of engineering and institutional controls has been essential to the cleanup and redevelopment of brownfield sites in New Jersey. During the Legislative Reform Stakeholder Process, DEP offered statistics showing that an overwhelming number of brownfield sites have been cleaned up and redeveloped using these methods. Properly maintained, the controls can eliminate contact with contaminants in perpetuity and meet the requirements of the Brownfields Act to protect public health and the environment. Neither DEP nor the Legislature should take steps that would discourage use of engineering and institutional controls at brownfield sites.

Better long term stewardship of engineering and institutional controls is needed. The Legislature should note that until very recently DEP devoted limited attention to the requirements for inspection and monitoring of engineering and institutional controls at contaminated sites. Directing more resources to existing inspection, monitoring and maintenance requirements is likely to improve long term stewardship of engineering and

institutional controls. Other methods that may improve long term stewardship include adoption of the Uniform Environmental Covenants Act or use of a permit program to track responsibility for the controls.

\* \* \*

DEP's Legislative Reform Stakeholder Process has addressed a variety of other site remediation issues and TRAC will continue to engage and assist the agency to develop additional reforms to improve site cleanups and redevelopment in New Jersey. Thank you for the opportunity to provide this testimony.

**Testimony to Senate and Assembly Environment Committees  
from Communications Workers of America Local 1034  
Site Remediation Program (SRP) reforms  
April 15, 2008**

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Good morning. My name is Adam Liebttag, and I am here representing the Communications Workers of America, Local 1034 and our President, Carla Katz who is unable to be here today.

Local 1034 represents over 16,000 working men and women in New Jersey in state, county and local government. Among our members in state government, we represent the majority of employees in the Department of Environmental Protection and in the Site Remediation Program, including scientists, geologists, case managers, and supervisors. We offer this testimony on behalf of those members in SRP who will be drastically impacted by the reforms proposed today, and we hope that this discussion is the just the beginning of a deliberative dialogue. The Union stands fully ready to participate in those discussions.

I want to make clear at the outset that Local 1034 does not oppose reform of the Site Remediation Program, however any reform must strengthen not degrade environmental protection standards, safeguard not sacrifice public health and invest not shortchange the necessary resources to reshape SRP to meet future challenges.

I will focus my comments today on two issues: staffing shortage and privatization, otherwise known as the Licensed Site Professional program.

**Backlogs/staffing shortage:**

According to the DEP, there are more than 18,000 active cases in the Site Remediation Program with 12,000 cases under a regulatory program and 6,000 under the Voluntary Cleanup Program. Approximately 4,000 new cases come into the program every year and only 3,500 cases are closed out by receiving a No Further Action letter. In short, the program takes on about 500 cases every year, meaning that over the last 5 years, as many as 2,500 new cases have accumulated in the program. And most of the cases

that do not receive NFAs are the most complicated, most contaminated, and most politically or environmentally sensitive sites which can drag on for years.

SRP staffing has fluctuated over the past nine years only from 491 to 515. If we went back further to the mid and late 1990s, we would see staffing numbers that dropped further from multiple reductions in force under the Whitman administration. SRP's mandate grows each year, while the staff struggle under the weight. There has been no commensurate growth in staff to match the growth in cases, let alone the increasing complexity of cases. Quite simply, SRP is taking on water faster than it can bail it out.

There is a simple but politically unpopular solution: SRP needs more staff and resources to meet this challenge. During the stakeholder process over the summer of 2007, several stakeholders – including those from the regulated, contracting, and engineering communities – acknowledged a critical staff shortage at the DEP and supported hiring additional staff.

The DEP estimates it would need an additional 1,000 positions to respond to all submissions within 60 days. Although the Union certainly supports adding the required number of new positions, we believe that a combination of solutions could alleviate case load and backlog problems.

60 days is not a one-size fits all standard that could apply equally to an underground storage tank case and to a complicated urban area, or daycare center. Despite multiple attempts of SRP with prioritization initiatives and task forces, the program still lacks a cohesive prioritization system that makes sense to staff and allocates resources where they are most needed. Without a balance of both prioritization and additional staff, reform will fail.

If Site Remediation policy and cleanup efforts are to be reformed, this administration must make a commitment and must take courageous steps to meet this challenge head on. And we have already seen in the Department of Youth and Family Services – now

the Department of Children and Families – an example of agency reform through committed investment to increasing staff, and reprioritizing and capping caseloads. As the state and the public supported the administration's efforts to protect children's health and safety, so will the public support SRP reform that is protective of public health and the environment.

#### Solutions:

1. Lift the hiring freeze on positions that are "self-funded," funded through fees or fines, or funded through dedicated sources. The state loses money, sacrifices the environment and public health, and frustrates municipal officials, residents, businesses, and this legislature with a backlog that could be alleviated by hiring more staff on dedicated funding lines.
2. Initiate an overtime program in certain sections of SRP to directly and aggressively attack the backlog. Relax the complicated and limiting overtime rules from the Department of Personnel that tie SRP's hands – when it would want to offer overtime to clear a backlog, it can not.
3. Targeted hiring of new positions – a relatively small number of additional technical support staff such as scientists and geologists will greatly speed the turnaround time on technical reviews for case managers. Combine hiring geologists and technical staff with phasing out of contracted geologists. DEP staff geologists review the work submitted by contracted geologists, and in many cases, have to correct, rewrite, or completely redo that work – which is a duplication of effort and double the expense to the state.
4. Increase revenue to support current and additional positions in SRP. Increase fees and fines on irresponsible parties. Another idea discussed during the stakeholder process was creation of a "surcharge" for certain types of sites to offset the additional costs to the department of a complicated site, or a site that safely merits faster cleanups. I underline "safely."
5. Prioritization of sites and setting realistic deadlines for types of sites – not a one size fits all deadline like 60 days response time.

#### Licensed Site Professional program:

The Union strongly opposes creation of a Licensed Site Professional program which essentially privatizes DEP regulatory authority to contractors. This is a privatization of authority and is not only a slippery slope to privatization of staff positions, but completely undermines any real positive reform of SRP. Giving contractors the ability to sample a site, determine a cleanup method, and finally to certify to DEP that the site is clean, is gutting the whole meaning of SRP. The public reads almost every week about

a contractor not living up to its obligations and a cleanup gone wrong. Our members in SRP that already have to re-review and overrule contractor work know that turning over DEP authority to non-DEP personnel guarantees more duplicative staff time and less environmental protection, not more.

Licensing site cleanup contractors raises pay-to-play concerns, places public health in the hands of private sector companies looking to make a profit, and outsources DEP's regulatory authority and responsibility. If the Department wants to license contractors in order to create an enforcement program, and to ensure that the work contractors already do is in good order, then that is fine. But we should not be privatizing an agency's statutory or regulatory authority over environmental protection. Regulating and protecting environmental cleanups should be a government function, not a power ceded to the private sector and the public deserves better.

The bottom line is that the State must commit to addressing this problem and its success will depend on how it dedicates resources and reallocates existing resources. The reality is that contractors will include the cost of their salaries, fringe, indirect, benefits, and overhead in their hours billed to the State or to the regulated party. If the State or the regulated party will have to pay for that contractor, then they should spend less money, more wisely, on new positions in Site Remediation that are accountable to the public and to the Department of Environmental Protection. Outsourcing or privatizing regulatory authority will create ticking timebomb cleanup sites where we will only uncover the problems years down the road.

Thank you.

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Contact Information:

**Carla Katz**, *President*

Communications Workers of America Local  
1034

1 Lower Ferry Road • West Trenton, NJ 08628

Phone: (609) 530-0060 • Fax: (609) 530-0638

**Adam Liebttag**, *Lead Staff Representative*

Communications Workers of America Local  
1034

1 Lower Ferry Road • West Trenton, NJ 08628

Phone: (609) 530-0060 • Fax: (609) 530-0638

**Testimony offered by  
Stewart H. Abrams, P.E.**

**Licensed Site Professional ("LSP") Program**

**April 15, 2008**

My name is Stewart Abrams. I am a senior remediation specialist with Langan Engineering and Environmental Services, Inc. Until last year, I was with a major national consulting firm where I was the National Practice Director for Remediation. I am a member of the remediation stakeholders committee. I also serve on the NJDEP Environmental Justice Advisory Council. I have consistently worked on complex remediation projects. Though I am not a Massachusetts LSP, I think I offer a unique perspective having worked under both the Massachusetts and New Jersey regulatory frameworks.

It is important to note that there is remarkable similarity between MA and NJ, in that there is a long term industrial legacy, an active Brownfield industry, urban centers in need of revitalization and a current industry base centered on real estate, financial and technology industries.

The Massachusetts site remediation program is laid out in a set of rules known as the Massachusetts Contingency Plan or "MCP". The MCP requires people who are responsible for site clean-ups to retain a Licensed Site Professional or "LSP" to manage the site investigation and clean-up work. The features of the program are as follows:

- Remedy Selection – A Responsible Party (RP) has flexibility in remedy selection. For the simple sites, the site closure process can proceed quickly. For complex sites, the RP has some flexibility in remedy selection within the framework of the regulations.
- Risk-based closures are available - Deed Restrictions and Institution Controls are established based upon clear risk-based procedures and standards.
- High priority sites – Referred to as "Tier IA sites". Until recently, these sites were directly under MADEP control and oversight. More of these sites are now going through the LSP process.

Some issues:

- LSP Auditing - A strong audit system was put in place from the outset. It was recognized that the key to making an LSP system work is oversight of the LSPs, not the sites themselves. It has been found that providing That said, only a small fraction of MADEP audits of LSP work find that additional field work is necessary and a smaller number of these sites end up coming to a different conclusion after the additional work is done. So the overall performance of the program appears good.

- State investment in regulatory revisions, guidance and training – At the beginning of the program, the MADEP took a proactive stance in training, writing revisions to regulations that did not work, and a willingness to listen and adjust. The program will not work unless the State DEP writes clear regulations with identified standards; conducts regular training programs, and provides a “hot line” or “help line” to talk about complex sites early in the process. The MADEP case managers are still engaged in the process, being available to support the LSP when needed.
- Public notification – The LSP system is coupled with requirements for public notifications and hearings. Thus the decisions of a LSP are subject to public scrutiny.

Overall, there is strong confidence in the LSP system in Massachusetts and it has generally worked out well for the public, responsible parties, and the taxpayers. Typically, sites are being cleaned up faster and in ways more responsive to public needs than in the more traditional direct regulatory oversight approach. The 3-9 month periods waiting for MADEP approvals on reports that were typical before the program no longer exist. (The reality is that in New Jersey, 3-9 months would be an improvement.)